ANNUAL REPORT

European Court *of* Human Rights

2019

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

ANNUAL REPORT

European Court *of* Human Rights **2019**

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Foreword

The year 2019 saw a series of crucial events for the Council of Europe as a whole. First of all, the Parliamentary Assembly and the Committee of Ministers opted for Russia's continued membership of the Council of Europe. The fact that almost one quarter of all applications currently pending before the Court concern the Russian Federation gives some idea of the scale of the consequences Russia's departure from the Organisation would have had for a large number of applicants. Such an eventuality would have represented a serious setback for human rights in that part of our continent.

2019 was also an important year for the Court, a year which bore witness to the ongoing nature of developments in the European human rights protection mechanism. No review of the year 2019 would be complete if it overlooked the first infringement-proceedings judgment delivered by the Court in the case of *Ilgar Mammadov v. Azerbaijan*. This first application of Article 46 § 4 of the European Convention on Human Rights was one of the highlights of the last twelve months and a major event in the European human rights protection system.

Furthermore, 2019 also saw the completion of the Interlaken Process. The Steering Committee on Human Rights adopted a report on the overall assessment of the Process, showing our Court in a very positive light. The Court will be replying to the report in 2020, but the positive assessment which it sets out already provides an incentive to press on with the reforms launched in the Court towards greater efficiency. We now have the requisite tools to continue reforming the Court, and that is what we shall most certainly be doing. We regard reform as an ongoing process. However, the support shown by the Steering Committee on Human Rights provides motivation to continue along that path. On the subject of reforms, I would just like to mention the implementation of the new method for drafting judgments and decisions, which came into force on 1 October and will be fully operational in 2020.

The major event in 2018 was the entry into force of Protocol No. 16, followed by the first request for an advisory opinion by the French Court of Cassation. In 2019 the Court was able to provide a prompt reply to that request, issuing its first such opinion just six months after submission of that request. It should be remembered that the Rules of Court had been amended in anticipation of this new procedure, and that guidelines had been adopted. A swift response had been particularly important because the issue raised, that is, the status of the intended mother in the framework of surrogate pregnancy, was particularly thorny and the Court's reply had been anxiously awaited. The Court has received a second request for an advisory opinion in 2019, this time from the Armenian Constitutional Court, which proves that this new procedure meets an expectation on the part of the superior courts. We shall undoubtedly be seeing further such requests in the future.

We cannot mention Protocol No. 16 without also referring to the Superior Courts Network. The Network has grown considerably, now embracing 86 superior courts from 39 countries. This is a definite success for what is incontrovertibly the largest network of superior courts worldwide.

The year 2019 saw a profusion of bilateral encounters with the superior courts. For example, there were working meetings with the Constitutional Court of the Russian Federation, the French *Conseil d'État*, the Croatian Constitutional Court, the Constitutional Court in Karlsruhe, the Andorran higher courts, the Romanian Court of Cassation and the Ukrainian Supreme Court. To those bilateral encounters we must add the meeting of superior courts which took place in Paris, in the framework of the French Chairmanship of the Committee of Ministers of the Council of Europe, on the subject of dialogue between judges.

As every year, the dialogue continued with the Court of Justice of the European Union, whom we invited to Strasbourg. In that regard, the relaunch of the procedure for the accession of the European Union to the European Convention on Human Rights was one of the outstanding events of 2019.

Major leaders, Heads of State and Government visited the Court in 2019. We received visits from the President of the Republic of Finland, Sauli Niinistö, the Prime Minister of the Kingdom of Spain, Pedro Sánchez, HRH Crown Prince Haakon of Norway, the President of the Republic of Portugal, Marcelo Rebelo de Sousa, and the Prime Minister of the Republic of Moldova, Ion Chicu. Several Presidents of Parliaments also came to the Court, which is important because Parliaments play an essential role in implementing the Court's judgments. We received visits from the President of the Lithuanian Parliament, Viktoras Pranckietis, the President of the Dutch Senate, Jan Anthonie Bruijn, and the President of the Moldovan Parliament, Zinaida Greceanîi.

Furthermore, I had the honour of being received at the Élysée Palace by the President of the French Republic, Emmanuel Macron, on the occasion of the meeting of the superior courts. This was an expression by all these public figures of their countries' attachment to the institution responsible for the protection of human rights in Europe.

As regards the French Chairmanship of the Committee of Ministers, several ministerial conferences were held on that occasion, in association with the Court. In that framework I was able to attend the Conference of Justice Ministers at the invitation of Ms Nicole Belloubet, and the Conference of Education Ministers, at the invitation of Mr Jean-Michel Blanquer.

Finally, the year 2019 was marked by the consolidation of our ties with the Inter-American Court of Human Rights. In October, a delegation from our Court visited Kampala to attend the first Forum of Regional Courts. This was the first tripartite meeting following the signature in 2018 of the so-called "San José Declaration" by the Presidents of the Inter-American Court of Human Rights, the African Court of Human and Peoples' Rights and the European Court of Human Rights. The Declaration, which sets up a standing forum for dialogue among the three Regional Courts, is a facility geared to strengthening dialogue, cooperation and institutional links among the three human rights courts in the world. The next tripartite meeting should take place in Strasbourg in 2021. As regards the human rights agencies, a particularly useful encounter was held in Geneva with the United Nations Human Rights Committee. This type of exchange on our respective sets of case-

law is very important from the angle of the coherency of human rights protection in Europe and the world.

Since my election I have been anxious to organise encounters with the Council of Europe's monitoring bodies. For instance, delegations from the Court have met up with GREVIO, CEPEJ, the members of the Committee of the Framework Convention for the Protection of National Minorities (FCNM) and ECRI. These meetings are absolutely essential. I am convinced that the work of the Strasbourg Court is part of a much wider context than judicial work *stricto sensu*. I consider the Court as part of a complex whole which makes the Council of Europe (through its various monitoring mechanisms) the true home of democracy on the continent of Europe. We are involved in a system for consolidating all the component parts of the rule of law which is unique worldwide. Above all, and this is the real import of all these encounters, the Court must not be an ivory tower: it must constantly listen to all the activities within the Council of Europe that could help nourish and enrich its case-law.

Dialogue with the superior courts in the Network; dialogue with the Court of Justice of the European Union; dialogue with the other human rights courts; dialogue with the Council of Europe's supervisory bodies; and, finally, dialogue in the framework of Protocol No. 16.

I consider that this ongoing dialogue between the European Court of Human Rights and the aforementioned players really was the main achievement of the year 2019. I hope that this absolutely vital dialogue will expand over the months and years to come.

Linos-Alexandre Sicilianos
President of the European Court
of Human Rights

Chapter 1

Speeches

Opening of the judicial year, 25 January 2019

Guido Raimondi
President of the
European Court
of Human Rights

Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly,

Chair of the Ministers' deputies,

Secretary General of the Council of Europe, Excellencies,

Ladies and Gentlemen,

I would like to thank you personally and on behalf of all my colleagues for kindly honouring us with your presence at this solemn hearing for the opening of the judicial year of the European Court of Human Rights. In keeping with tradition, I also wish you a happy new year for 2019.

I would particularly like to welcome the representatives of the local authorities, whose support has been valuable. Our Court is known

throughout the world as the "Court of Strasbourg". So when Strasbourg comes under attack, as was the case on 11 December, the European Court of Human Rights stands by the people of this city. It is important for me to emphasise this point.

This hearing is a particularly significant one for me. It is the last time I will be addressing you on such an occasion. Next year you will be hearing my successor speak to you from this very rostrum. For my part, although I will have returned to Italy, it will always be a source of pride to have presided over this Court, and I will remain eternally grateful to the judges who elected me and helped me to fulfil my mission.

It is not my intention today to take stock of these past three years, but I would nevertheless like to share some personal thoughts.

As usual, I will begin by giving you some statistics about the Court's activity. I will start with a reminder: in January 2016, when I spoke here for the first time as President of the Court, nearly 65,000 applications were pending. At the end of 2018, that figure stood at around 56,000 – down by about 14%, which is clearly a satisfactory result. I would add that in 2018 the Court ruled in over 42,000 cases. This is the result of the efforts made by all the judges and members of the Registry, to whom I express my thanks.

Over 70% of pending cases concern just six countries. Among them, the high number of applications lodged against the Russian Federation (almost 12,000) should be highlighted in view of the current situation in the Council of Europe. I will return to this matter shortly, but the significant volume reflects, in my view, the degree of trust shown by Russian nationals in the European mechanism for the protection of human rights and the importance it represents for them.

A closer analysis of these figures reveals that the Court's workload is made heavier particularly by structural situations in certain countries, thus generating a considerable volume of applications. We have developed working methods, including automated processes, which have proved very efficient. Nevertheless, it is mainly at domestic level that these cases must be resolved, in accordance with the subsidiarity principle. More generally, the weight of the case-load emanating from a given country is an indicator of the effectiveness of Convention implementation in that country. Once again, for subsidiarity to function properly, the national authorities must play their full role as stakeholders in the Convention system.

Among all the pending applications, we have over 20,000 which are high priority. To be clear, many of these cases are actually repetitive in nature, as they concern individuals complaining about prison

overcrowding. However, they raise questions under Article 3 of the Convention, which justifies their priority status. Moreover, this is a very good example of a problem for which a long-term solution can be found only if efforts are made at national level.

In actual fact, the biggest challenge for the Court is undoubtedly the volume of Chamber cases which cannot be dealt with by a committee on account of their complexity or the novelty of the question raised. Our aim is to ensure that the Court can devote enough time to the most important and most complex of these cases so that they can be processed as soon as possible.

* * *

In 2019 we will be celebrating the sixtieth anniversary of the European Court of Human Rights. You will have seen, in the entrance hall, the exhibition we have organised on this occasion, with the support of the Finnish authorities, whom I would like to thank; it was inaugurated this week by the President of Finland, Sauli Niinistö.

So, for 60 years now, our Court has been contributing to the harmonisation of European standards concerning rights and freedoms. This collective guarantee mechanism emerged from the willingness of Europeans who, having been traumatised by the atrocities of the Second World War, expressed, in adopting the European Convention on Human Rights, their attachment to democracy, to freedoms and to the rule of law. Above all, they set up a Court to ensure that their own obligations would be complied with.

Throughout this sixty-year period, the Court has interpreted the Convention dynamically in the light of living conditions, which have evolved considerably. Europe in the 1950s and the world we now live in are very different places. Our ways of life and moral standards are no longer the same. Science, medicine and biology have seen outstanding progress. The collection and retention of data concerning individuals, and the appearance of the Internet, with the extraordinary but also worrying consequences of these developments, have had a radical effect on our lives but also on the relations between the State and individuals, and between individuals themselves.

At worldwide level too, the changes have been far-reaching: migratory flows and environmental problems, not to mention the threat of terrorism, have altered our perception of the world and how we live.

I believe that the Court has been able to face up to the challenge of these upheavals.

Taking account of all these technological and societal developments, the Court has enabled the European Convention on Human Rights to remain relevant.

At a procedural level, the Court, which was set up in 1959, adapted itself to a new mechanism which represented a change of model, that of a single and full-time Court which radically transformed the original system. In 2018 we celebrated the twentieth anniversary of the "new" Court; twenty years during which the Court has delivered a judgment or decision in over 800,000 applications. It now enjoys worldwide renown and is seen as a model for others. I would even say that it is a beacon which lights the way for all those, throughout the world, who seek to strengthen the principles of rule of law and democracy.

Our Court enjoys close and cordial relations with the other regional human rights courts. In 2018 we signed a joint declaration, known as the "San José Declaration", with the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights. This text is testament to our accomplishments and to the significance of the links now established between our courts.

Nevertheless, in spite of all these achievements, there is no longer much cause for optimism – first of all, because of the serious and unprecedented crisis in the Council of Europe. It is both political and budgetary. On a budgetary level, let me be clear: if we want to pursue the progress that we have made for several years now, in fact since the start of the Interlaken process, our resources must be maintained. We have constantly striven to become more efficient and we are succeeding. On that point, we are launching, this year, a new process intended to bring about a significant increase in the non-contentious solutions so as to lighten the Court's workload. However, as you know, we have no control over the volume of incoming cases and, if jobs are cut in 2019, this will inevitably have an impact on our processing capacity.

But the crisis is not only a financial one. What is at stake today is the possibility afforded to all Europeans – those of Greater Europe – thanks to the European Convention on Human Rights, to be able to live on a continent where their rights and freedoms are recognised and protected: "from the Atlantic to the Urals", to use the much-quoted phrase, particularly pertinent in the present circumstances. The departure of a member State – and I am obviously talking about the Russian Federation – would be *a huge setback for human rights* not only for that country, as Thorbjørn Jagland, Secretary General of the Council of Europe, rightly pointed out, but for all member States. The signal that this would send to Europeans would be at odds with everything that the Council of Europe has built

up over the past seventy years – another anniversary we will be celebrating in 2019.

But this crisis now facing the Council of Europe is not my only cause for concern. There are deeper issues at stake. Men and women of my generation had, for a long time, taken the view that once democracy was established it could not be undone. We were sure that democracy was here to stay. But, as some scholars have observed, we are witnessing a phenomenon of social disillusionment, which could lead to democratic deconsolidation. For the younger generations, automatic support for the idea of human rights is no longer a given.

The reasons for this situation are numerous and varied: stagnation of living standards; fears raised by waves of migration or stemming from isolationism; the anarchical development of social networks and large-scale dissemination of so-called "fake news". Voters seem to be losing faith in their political system. The fact that citizens have turned their backs on the democratic model is such that the spread of extremist discourse, and even in some cases the rise to power of leaders who call into question the foundation of a pluralistic democracy, is facilitated. As the preamble to the European Convention on Human Rights clearly states, human rights are best maintained by an effective political democracy.

There is a risk of democracy being dismantled: first by undermining the rights of the opposition and the independence of the justice system, then by suppressing the media, and even by imprisoning opponents. Political leaders whose intention it is to dispense with the checks and balances, will seek to weaken, or even to eliminate, those institutional actors which nevertheless remain essential to the democratic process. They see the justice system, the press, the opposition as "enemies of the people".

Our Court is a first-hand witness of these developments. Thus, one of the indicators of the decline in the rule of law is undoubtedly the application of Article 18 of the Convention. It provides – as you know – that any restriction of the rights and freedoms guaranteed by the European Convention on Human Rights must not be applied for any purpose other than that for which it has been prescribed. This provision, which is crucial for a pluralistic democracy, has been breached only twelve times, but five times during the year 2018 alone. This is both a worrying and a revealing symptom. Without pinpointing any particular country, it can be seen that the aim is often to reduce an opponent to silence, to stifle political pluralism, which is an attribute of an "effective political democracy" – a concept contained, as I was saying, in the Preamble to the Convention.

Faced with the situation that I have just described, what response should be forthcoming from the judicial protection mechanisms, such as that of the Strasbourg Court or of the domestic courts – as guarantors of the rule of law – that you represent? There is no easy answer but, to cite Yascha Mounk, a political analyst who has studied these phenomena in his work *The People versus Democracy*:

> If we want to preserve both peace and prosperity, both popular rule and individual rights, we need to recognize that these are no ordinary times – and go to extraordinary lengths to defend our values.

We are certainly ready and willing to go to such lengths, to pursue what we have been doing for the past 60 years. All of us, judges of superior domestic courts and international judges, have a role to play in the protection of democracy and the rule of law.

Our Court, for its part, will never renege on the very mission for which it was created. In 2018 our case-law has once again been testament to its resolve. I would like now to refer to a few examples, even though, as you know, it is always difficult every year to single out one case rather than another, in view of the significance and variety of the questions submitted to it.

I will begin with two judgments delivered by the Grand Chamber, which is seen by many as setting the benchmarks of our case-law.

The first, *S., V. and A. v. Denmark*, concerns a phenomenon which has unfortunately been spreading in our present-day society, namely violence surrounding sports competitions. The applicants, football supporters who were in Copenhagen to watch a match, had been detained for more than seven hours by the authorities to prevent any risk of hooliganism. The Court found that there had been no violation of the Convention, relying on the fact that the Danish courts had struck a fair balance between the right of those supporters to their freedom and the importance of stopping hooligans. In our Court's view, the domestic courts had carefully examined the strategy applied by the police to avoid clashes. The police had, in particular, taken account of the domestic-law rule limiting preventive custody to six hours, even though that limit had been slightly exceeded; they had begun by entering into a preliminary dialogue with the supporters, before having recourse to more radical measures such as deprivation of liberty; they had made every effort to detain only those individuals whom they regarded as representing a risk for public safety; and lastly they had carefully assessed the situation in order to be able to release the applicants once the situation had calmed down.

The judgment in *S., V. and A. v. Denmark*, in particular emphasised the need to weigh in the balance the duty to avoid disorder against the rights secured to individuals in relation to custodial measures. The Court applied the subsidiarity principle, relying on the fact that the assessment by the domestic authorities had been neither arbitrary nor manifestly unreasonable and that the deprivation of liberty in question had been consistent with the rules of domestic law.

The second Grand Chamber judgment I wish to mention was delivered at the very end of last year. It is the case of *Molla Sali v. Greece* concerning the application of sharia law by the Greek courts. This judgment gave rise to erroneous interpretations, with some commentators suggesting that our Court wanted to pave the way for the application of sharia law in Europe. However, the *Molla Sali* judgment leads to precisely the opposite conclusion.

In that case, a Greek national belonging to the minority Muslim community, had bequeathed all his property to his wife in a will drawn up under the civil law of Greece. The sisters of the deceased had brought a case before the domestic courts, which took the view that questions of inheritance within the Muslim community had to be settled by the "mufti" according to the rules of Islamic law, pursuant to the Treaties of Sèvres and Lausanne of 1920 and 1923. The widow, who was thus deprived of three-quarters of her inheritance, considered that she had sustained a difference in treatment on religious grounds, because if her late husband had not been a Muslim she would have inherited his entire estate.

Ruling unanimously, the Court took the view that the difference in treatment sustained by the applicant did not have any objective or reasonable justification. First, freedom of religion did not oblige Contracting States to set up a given legal framework to grant religious communities a status carrying special privileges. But if such a status were to be created, the conditions of its application could not be discriminatory. The fact of not allowing followers of a minority religion to be able to opt voluntarily for the ordinary law had led to discriminatory treatment and infringed the right to free identification, in other words the right to choose not to be treated as someone belonging to a minority. This right, I would point out, constitutes the "cornerstone" of international law on the protection of minorities. Lastly, the Court noted that Greece was the only country in Europe which, up to the material time, had been applying sharia law to part of its citizens against their will. The Court thus found a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1. The situation evolved in the course of the procedure as,

on 15 January 2018, a law came into force with the aim of abolishing the specific rule imposing recourse to sharia law in respect of family matters of members of the Muslim community. By giving priority to the ordinary law over the religious law, in accordance with the applicant's wishes, this was one of the leading judgments of the past year.

Some Chamber judgments in 2018 have also aroused great interest or have been widely reported in the media. I will briefly mention a number of those which, in my view, reflect the key questions with which our Court, just like our societies, is confronted.

New technologies have, once again, been at the forefront of our case-law. For example, in the case of *M.L. and W.W. v. Germany*, the Court had to arbitrate between different Convention rights. The case concerned individuals who had been convicted of premeditated murder and who sought a ban on the possibility for media organisations to retain references to their trial and conviction on their websites. Faced with a balance to be struck between the applicants' right to respect for their private life and the public's right to receive information, the Court gave priority to the latter. Like the German Federal Court of Justice, the Court acknowledged the applicants' interest in no longer being confronted with their conviction, which was far from recent, but it took the view that the public had an interest in being informed about newsworthy subjects, and that the media had to be able to make information available to the public from its archives, however old it might be.

The last case I will mention tonight concerns my own country: *V.C. v. Italy*. This case concerned a minor who was the victim of a child prostitution ring. The Court found against Italy, taking the view that the domestic authorities, who had been aware of the girl's vulnerable situation, had not taken any measures to protect her from abuse. The judgment illustrates the Court's concern to protect, as it always has done, the weakest and the most vulnerable in society. We already had a considerable body of case-law protecting women from any forms of violence and this case is a further example.

* * *

But 2018 has also given us reasons to be thankful, and I am thinking in particular of the ratification by France of Protocol No. 16, on the initiative of President Macron. This tenth ratification triggered the entry into force of that instrument. This is a milestone in the history of the European Convention on Human Rights and a major development for the protection of human rights in Europe. Our Court is also now part of a well-established network with superior courts from around Europe. To

show that this Protocol had been keenly awaited by the supreme courts concerned, just two months after its entry into force we received our first request for an advisory opinion, which came from the French Court of Cassation. It was announced by the President of the Court of Cassation, Bertrand Louvel, during his visit to the Court. I would like to pay tribute to him, as he is attending this solemn hearing for the last time in his current capacity; he is an eminent figure of the French judiciary, who has also been a loyal ally of the European Court of Human Rights.

The request for an opinion is now being examined and our Court is ready to take up this new challenge.

The subject of Protocol No. 16 leads me to say a few words on the case-law exchange network. It has developed significantly, because it now includes 71 superior courts from 35 countries. As this permanent dialogue with supreme courts has been one of the key aspects of my presidency, I am obviously pleased to note that there have been many meetings with these courts in 2018. In the course of the year we had exchanges with the Spanish Constitutional Court and Supreme Court, the Constitutional Authority of San Marino, the Greek Court of Cassation, the French *Conseil d'État*, the Supreme Court and other superior courts of the UK, the Supreme Court of Iceland, the French Court of Cassation, the Irish Supreme Court, and, last but not least, the Supreme Court of the Russian Federation, on the occasion of the highly symbolic visit of Chief Justice Lebedev for the launch of an Encyclopaedia of Human Rights.

Presidents of Constitutional Courts and Supreme Courts,

Ladies and Gentlemen,

Before I conclude, allow me to take you beyond the confines of our continent for a moment. It is often said that India is the largest democracy in the world. In 2018 the judges of the Indian Supreme Court delivered a judgment declaring Article 377 of the Indian Criminal Code illegal, which criminalised same-sex intercourse. That historic decision, long awaited by human rights advocates, received worldwide coverage. Going beyond the decision itself and the progress it represents for those concerned, I was proud to see that, in its judgment, the Supreme Court in Delhi cited, in several places, our Court's well-known cases of *Dudgeon v. the United Kingdom*, *Norris v. Ireland*, *Modinos v. Cyprus* and *Oliari and Others v. Italy*, which have gone such a long way towards putting an end to the discrimination sustained by LGBT people.

For me, this was additional proof that our case-law is a source of inspiration even beyond the continent of Europe. It is also proof that, in spite of the differences in our cultures and traditions, human rights

are universal, because in taking its decision the Indian Supreme Court looked to Europe – and indeed to Strasbourg.

The time has now come to give the floor to our guest of honour. In keeping with our tradition, we are receiving the president of a constitutional court or authority. But that is not his only credential.

Thus our guest of honour is Laurent Fabius, one of those figures who needs no introduction. He has not merely witnessed, but has played, a leading role in the history of France – the history of Europe – and even in that of the planet, because we all remember his key role as Chair of the international Climate Change Conference, held in Paris in 2015.

President Laurent Fabius,

President of the French Constitutional Council,

In view of all those credentials,

Because your experience is far-reaching,

And since your views are of value to us and your presence here is a major event, we are now keen to listen attentively to you.

Laurent Fabius
President of the French Constitutional Council

President of the European Court of Human Rights Presidents of Constitutional Courts and Supreme Courts, President of the Parliamentary Assembly,

President of the Ministers' Deputies, Secretary General of the Council of Europe, Excellencies,

Judges of the Court, Distinguished Guests, Ladies and Gentlemen,

If I deserve a prize, it is for persistence.

Thus did the eminent jurist René Cassin, member of the Constitutional Council and subsequently President of the European Court of Human Rights, express himself when mention was made in his presence of the Nobel Peace Prize he had received. It is this same virtue of persistence that I should like to emphasise in acclaiming your Court, President Raimondi, as I begin the remarks that – in response to your kind invitation – I am honoured to make before you all.

The ties between our two institutions, the French Constitutional Council and the European Court of Human Rights, both of which will celebrate sixty years of existence within a few months of each other, are almost as old as the institutions themselves.

It is because the European Court and the French Council share a responsibility for protecting and applying human rights in the face of social challenges that it is invaluable to be able to count on the close ties of friendship which bind us.

Admittedly, each of our institutions has followed its own path, but, while the role of the French constitutional judge is not to apply the European Convention in the national legal order, what unites us is clearly more important than our differences. These close ties are confirmed by our desire, recently expressed, to be one of the highest national courts entitled, with the Conseil d'Etat and the Court of Cassation, to engage with the European Court under Protocol No. 16.

President Raimondi, at the risk of casting a shadow over this happy occasion, I should like to stress from the outset how vital it is that our judicial human rights system, a system aptly described by our friend President Voskuhle as "a Calder mobile", should maintain all its intrinsic ties, so great are the risks that it disintegrate under the weight of threats and challenges. Not only must we preserve the ties between us, but we must rise to the key challenges of our time, or risk being destroyed by them. The threats unfortunately do exist, and they compel us to be as vigilant as those who built our institutions.

The Constitutional Council and the Convention system

I have just referred to our differences. As is well known, in its 1975 case-law on the Voluntary Termination of Pregnancy Act the French Constitutional Council held that it was not its role to examine whether laws were compatible with the Convention, but rather to assess whether they complied with the Constitution. In consequence, our Council may appear to be less close to the Court than certain of the other courts represented here. In addition, we fulfil roles which are not entirely identical. Ours goes as far as adopting decisions that are not only binding on the parties to the disputes, but have *erga omnes* effects.

Nonetheless, it would be a mistake to consider that the French Constitutional Council could, for these reasons, ignore the remarkable work accomplished by the Court since its creation.

I would add, with regard to the rules governing applications to our respective courts, that there has been a significant *rapprochement* in our approaches since France adopted the famous request for a preliminary ruling on constitutionality (QPC) in 2008. As you know, this procedure – which I readily refer to as a "citizen's request" so as to be understood by a wider public – creates a right to an individual remedy in any dispute against any provision that is considered to be contrary to the rights and liberties guaranteed by the Constitution. It is consistent with the Council of Europe's endeavours to strengthen the protection of human rights,

work that took tangible form through the entry into force in 1998 of Protocol No. 11, which enabled applicants to apply directly to the Court.

The success of the QPC in France is spectacular. Today 80% of the cases we examine come to us through this *a posteriori* remedy. In less than 10 years, thanks to the QPC, we have reached almost as many decisions *a posteriori* as, we did *a priori* decisions in 60 years. This move to bring the system for human rights protection closer to citizens can certainly be strengthened further, through the awareness-raising efforts that are incumbent on us all. For this reason we have decided that, from now on, some of our public hearings will take place in the regions, away from the Constitutional Council's Paris seat. The first is due to be held in February in Metz, not far from where we are gathered today.

The principles that our role requires us to embody are those described by one of our best lawyers, in comparing them with yours, as "cloned principles". The questions that we must address are very similar, if not the same, as those facing the European Court of Human Rights. To judge by just a few examples, so are the responses, such as the requirements of judicial independence and impartiality, adversarial proceedings and compliance with the rights of the defence, human dignity, the right to an effective remedy or the scope of the *ne bis in idem* principle.

It was thus natural that the "wordless dialogue" between our institutions, which already took tangible form through our participation in the Superior Court Network, be extended through the designation of the French Constitutional Council as a national "highest court" for the purposes of Protocol No. 16.

In short, beyond our specificities or differences, what is important is that, together, we are able to protect human rights as well as possible, in a consistent manner and with persistence.

Bearing this in mind, President Raimondi, Presidents of Constitutional Courts and Supreme Courts, I am pleased to inform you that, on the occasion of the French Chairmanship of the Council of Europe, the Constitutional Council, the *Conseil d'État* and the Court of Cassation are honoured to invite you to Paris on 12 and 13 September 2019 for a conference of supreme courts, the theme of which will be "dialogue between judges".

The future role of constitutional courts as they face contemporary challenges

President Raimondi, if, together with my colleagues in the Constitutional Council, I believe that is essential to maintain the closest of ties between

our highest courts, this is not with a view to preserving, as Paul Valéry wrote, "that inimitable pleasure one finds only in one's own company". Rather, it is because the questions put to us have dimensions which, by their very nature, cannot be adequately addressed by strictly national responses.

Allow me to cite as examples three of the main issues on which the French Constitutional Council was required to rule in 2018, all three of which relate to challenges that, I believe, are common to all of the courts which safeguard fundamental rights and freedoms.

Firstly, with regard to what one might describe as the challenge of technology, we held for the first time, in respect of the legislation adapting French law to the so-called GDPR European Regulation, that not only are the authorities not authorised to use algorithms as the basis for individual decisions on automatized processing of "sensitive data", but also that no decision can be based solely on an algorithm whose operating principles are not disclosable, and that the use of "self-learning" algorithms was limited by the obligation on the data controller to be capable, at any stage, of providing a detailed explanation of its functioning. In view of technological advances, this question will undoubtedly become increasingly pressing.

Another essential challenge concerns democracy; last year we also took what I believe to be the first decision on a law concerning the dissemination of false information which could affect the integrity of an election. On that occasion, the Constitutional Council held that an urgent-applications judge could only block the dissemination of false information if the "inaccurate and misleading nature" of the content and the "likelihood of [its] affecting the integrity of the ballot" were apparent. This is unfortunately another issue which is likely to come before us all on a more frequent basis.

Lastly, faced with the challenge of citizenship and living together harmoniously, the Council held for the first time that "fraternity", that superb concept described by Victor Hugo as "the third step of the highest platform", was a principle with constitutional status, derived, *inter alia*, from the motto of the Republic – "Liberty, Equality, Fraternity". We found that the "offence of solidarity", previously enshrined in French law and condemning any person who provided humanitarian assistance to an unlawful migrant, was contrary to the Constitution. This decision has sometimes been read superficially, as happens in my country and, if I understand correctly, in yours. Certain commentators, unintentionally or otherwise, forgot that we had also reiterated that no principle or rule of constitutional rank afforded to aliens general and absolute rights of

entry to and residence in France. In other words, aiding unlawful entry and residence continues to be an offence. Here we see the constant search for a balance between freedoms and public order.

President, I should like to add a fourth theme, that of the climate and, more broadly, the environment, which, as we are all aware, threatens the survival of humanity itself. Courts are receiving an increasing number of requests from citizens, associations, NGOs, companies and towns, seeking to ensure that the States comply with their obligations in terms of environmental protection. In the area of climate alone, litigation has developed significantly since the *Urgenda* ruling by the Dutch courts in 2015. The United Nations Environment Programme counted almost 900 climate cases in 2017, more than a hundred of which were in the European Union. In such disputes, and more generally in the area of environmental protection, what is our role as guardians of fundamental rights? In protecting the environment, we are also protecting human rights, namely the rights to health, safety and, beyond these, human dignity. The European Court of Human Rights has understood this very clearly. Since its 2009 judgment in the case of *Tătar v. Romania*, it has acknowledged the right to live in a safe and healthy environment and, in so doing, has joined a more general movement to enshrine environmental law at the highest level of the hierarchy of laws. As environmental threats worsen and certain politicians demonstrate a lack of ambition, we can all sense that human rights litigation as applied to the environment will grow in importance, making the courts, even more than they are at present, major players in the construction of environmental justice.

Threats to freedoms and to the rule of law

President, Ladies and Gentlemen – I would add one final point which, over and above any technical considerations, will be my main message today. What, alas, do we see happening in several European countries? An ever-growing catalogue of unacceptable attacks on fundamental rights, be they measures casting doubt on the independence of the judiciary and media freedom, access to the fundamental right to asylum, or the increased instances of arrests of political opponents and homophobic assaults.

Extremism and brutalism are the marks with which some would like to imprint our era.

As judges of fundamental rights, we cannot tolerate any form of extremism whatsoever, as we protect the rights and freedoms guaranteed

by the supreme standards with whose application we are entrusted. We must act with unfailing vigilance to strike a harmonious balance between all of the principles and rules that are safeguarded by these founding texts. Equally, we cannot accept that, through the scapegoating of certain individuals, anyone is deprived of his or her fundamental rights.

May I be even clearer? It is no accident that, at the very moment that these threats are growing and merging, attacks on the highest courts are increasing. Under various pretexts and in various forms, those who wish to destroy the rule of law have understood that if their brutalism is to prevail, they must attack precisely these institutions and the judges whose task it is to protect the rule of law.

Through our decisions and our conduct, we, as the guardians of fundamental rights, must stand together to oppose the madness of those Janus-like leaders and States, who show a supposedly liberal face but whose other side is decidedly authoritarian.

We know that freedom without security leads to chaos, but that, inversely, security without freedom leads to totalitarianism. Since Antigone's Letter, we are also aware that resistance to State madness requires constant legal and judicial watchfulness. The survival of the rule of law depends largely on this resistance.

I began by referring to persistence; I would close by adding vigilance and resistance. It is these values in particular that we share, and, since we are still in the period of start-of-year wishes, I wish you this vigilance, this resistance and this persistence; may we all continue to embody them.

Chapter 2

Case-law overview

This overview contains a selection by the Jurisconsult of the most interesting cases from 2019.

In 2019[1] the Grand Chamber delivered fourteen judgments and its first advisory opinion under Protocol No. 16 to the Convention. It defined the States' obligations under the Convention with regard to traffic accidents (*Nicolae Virgiliu Tănase v. Romania*), the monitoring of psychiatric inpatients at risk of suicide (*Fernandes de Oliveira v. Portugal*) and the therapeutic treatment of detainees placed in a psychiatric institution (*Rooman v. Belgium*).

It ruled on the specific case of criminal investigations with a transnational dimension, entailing an obligation on States to cooperate (*Güzelyurtlu and Others v. Cyprus and Turkey*).

The Grand Chamber developed the case-law on asylum-seekers with regard to two scenarios: where such individuals were in a transit zone located at the land border between two member States of the Council of Europe and subsequently expelled to a State that was not their country of origin (*Ilias and Ahmed v. Hungary*), and where they were confined in an airport transit zone (*Z.A. and Others v. Russia*).

It reiterated the case-law principles governing video-surveillance in the workplace and employees' right to respect for their private life (*López Ribalda and Others v. Spain*). Having examined the placement of a vulnerable child in a foster family and subsequent adoption, it pointed out the procedural guarantees and respective interests that the national authorities are required to take into consideration in order to be able

1. The overview is drafted by the Directorate of the Jurisconsult and is not binding on the Court.

to take decisions in line with Convention standards (*Strand Lobben and Others v. Norway*).

In its first advisory opinion, the Court examined the questions raised with regard to the private life of a child who was born as the result of a surrogacy agreement performed abroad and the recognition of a legal relationship between that child and the intended mother, with whom there was no genetic link (request no. P16-2018-001).

The Grand Chamber also clarified the interpretation of essential concepts governing the right not to be tried or punished twice, as defined in Article 4 §§ 1 and 2 of Protocol No. 7 (*Mihalache v. Romania*).

Lastly, in an inter-State case, the Grand Chamber ruled on the issue of granting just satisfaction (*Georgia v. Russia (I)*). For the first time, it was also called upon to determine whether a State had respected its obligation under Article 46 of the Convention to abide by a final judgment against it (*Ilgar Mammadov v. Azerbaijan*).

This year the Court delivered other important leading judgments: with regard to admissibility, it ruled on the calculation of the six-month time-limit (*Akif Hasanov v. Azerbaijan*), the loss of victim status (*Porchet v. Switzerland*) and its jurisdiction *ratione loci* (*Romeo Castaño v. Belgium*, applying the principles set out in the *Güzelyurtlu and Others v. Cyprus and Turkey* judgment).

With regard to the rights and freedoms guaranteed by the Convention, the Court emphasised the national authorities' obligations to ensure protection of the life of a victim of abduction (*Olewnik-Cieplińska and Olewnik v. Poland*); this obligation also applied where a European arrest warrant had been issued against a person suspected of terrorist offences (*Romeo Castaño v. Belgium*).

The Court laid down case-law principles as regards detainees' conditions of transport (*Tomov and Others v. Russia*) and clarified the principles governing effective domestic remedies for poor conditions of detention (*Ulemek v. Croatia*). It ruled on the obligation imposed on a life prisoner to cooperate with the authorities in combating Mafia crime in order to obtain the possibility of release (*Marcello Viola v. Italy (no. 2)*).

With regard to migrants, the Court reaffirmed the authorities' obligation to protect unaccompanied foreign minors who, having fled their country, were subjected to precarious and degrading living conditions (*Khan v. France*).

The Court also ruled on the scope of the right to speedy judicial review of the lawfulness of detention, safeguarded by Article 5 § 4 (*Aboya Boa Jean v. Malta*), and on whether a reduction of sentence is capable of affording "compensation" within the meaning of Article 5 § 5.

The case-law was also developed with regard to oral communication, in person and in police premises, between a lawyer and his detained client (*Altay v. Turkey (no. 2)*).

Other judgments of jurisprudential interest concerned the principle that punishment should only be applied to the offender, in the context of one company's merger into another (*Carrefour France v. France*), defence access to voluminous data gathered by the prosecution during a criminal investigation (*Sigurður Einarsson and Others v. Iceland*) and the Article 7 compatibility of the national judicial interpretation of criminal-law provisions (*Parmak and Bakır v. Turkey*).

With regard to respect for "private" life, the Court also gave judgment on the scope of the right to one's image, reputation or honour (*Vučina v. Croatia*) and the obligation to submit to a paternity test (*Mifsud v. Malta*). The Court also addressed, in the context of anti-terrorism, the powers granted to the authorities to stop, search and question passengers at border checks (*Beghal v. the United Kingdom*) and requests for escorted prison leave to attend a relative's funeral (*Guimon v. France*).

The Court ruled on the impact of housing-benefit reform on vulnerable social-housing tenants (*J.D. and A v. the United Kingdom*).

Lastly, the case-law was clarified with regard to the striking-out of cases (*Taşdemir v. Turkey, Kutlu and Others v. Turkey* and *Karaca v. Turkey* and *Tomov and Others v. Russia*).

The Court's case-law also had regard to the interaction between the Convention and European Union law. In particular, the Court ruled in cases concerning the European arrest warrant (*Güzelyurtlu and Others v. Cyprus and Turkey* and *Romeo Castaño v. Belgium*) and referred to the European Union's positive law in the field of competition (*Carrefour France v. France*).

In several cases the Court also took into account the interaction between the Convention and international law. In particular, it referred to the Council of Europe's European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters (*Güzelyurtlu and Others v. Cyprus and Turkey*) and to the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and of the UN Human Rights Committee (*Romeo Castaño v. Belgium)*. In addition, it consolidated its case-law in the light of the UN Convention on the Rights of Persons with Disabilities and the United Nations' work in this area, and also in the light of Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder (*Fernandes de Oliveira v. Portugal,*

Rooman v. Belgium). It also relied on the work of the UN International Law Commission (*Ilgar Mammadov v. Azerbaijan*) and took account of the findings of international organisations with regard to the situation of migrants (*Khan v. France*).

The Court further developed its case-law on States' positive obligations under the Convention, particularly with regard to protection of the right to life (*Fernandes de Oliveira v. Portugal*, *Nicolae Virgiliu Tănase v. Romania* and *Olewnik-Cieplińska and Olewnik v. Poland*) and to respect for private life in the workplace (*López Ribalda and Others v. Spain*).

Finally, the Court ruled on the scope of the margin of appreciation to be granted to the States Parties to the Convention (request no. P16-2018-001, *López Ribalda and Others v. Spain*, *Beghal v. the United Kingdom* and *J.D. and A v. the United Kingdom*).

JURISDICTION AND ADMISSIBILITY[2]

Admissibility (Articles 34 and 35)

Six-month period (Article 35 § 1)

The judgment in *Akif Hasanov v. Azerbaijan*[3] answered the question whether application of the six-month rule could require an additional obligation of diligence from an applicant.

The applicant was prosecuted and convicted in administrative proceedings for minor hooliganism. He lodged an appeal at the end of November 2007. While the time-limit for deciding that specific appeal was three days and the appeal decision was adopted in December 2007, the appeal court did not send the decision until August 2009. In January 2010 the applicant applied to the Court under Articles 6 and 7 of the Convention. The Chamber found that the applicant's unexplained inactivity for more than two years breached the six-month time-limit and that the application had to be rejected pursuant to Article 35 § 1 of the Convention.

The case is noteworthy for the Court's examination of when the six-month time-limit begins to run, in circumstances where an applicant,

2. See also, under Article 2 (Right to life – Effective investigation) below, *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019, and *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019, and, under Article 5 § 5 (Right to compensation), *Porchet v. Switzerland* (dec.), no 36391/16, 8 October 2019.

3. *Akif Hasanov v. Azerbaijan*, no. 7268/10, 19 September 2019.

while entitled in domestic law to wait to be served with a copy of the final domestic decision, remains passive awaiting that decision for an evidently excessive period of time before introducing his application to the Court.

According to the Court's well-established case-law, where an applicant is entitled by domestic law to be served automatically with a copy of the final domestic decision, the object and purpose of Article 35 § 1 are considered best served by counting the six-month time-limit as running from the date of service of the copy of the decision (for instance, *Worm v. Austria*[4], and, more recently, *Artur Parkhomenko v. Ukraine*[5]). Where domestic law does not provide for service, the date the decision was finalised is the starting-point, that is, the date from when the parties were able to find out its content (*Papachelas v. Greece*[6]) and, in that case, the applicant or his or her lawyer must show due diligence in obtaining a copy of the domestic decision (*Ölmez v. Turkey*[7]).

In the present case, the applicant was entitled to be served with the final decision (as in *Worm*). However, given the evident and excessive delay in its service, the Court held that the applicant could not be relieved of his own, individual obligation to undertake basic steps and to seek information from the relevant authorities about the outcome of his appeal. In the absence of any explanation in this respect, and having regard to the circumstances of the case, the Court considered that his unexplained inactivity for more than two years in respect of a possible miscarriage of justice on the part of the appeal court fell foul of a major purpose of the six-month rule under Article 35 § 1 of the Convention.

The Court has therefore nuanced the *Worm* case-law by introducing, in that context also, a certain duty of diligence in the case of an evidently excessive delay of delivery, although it is worth noting the particular circumstances of the case: the final decision was due to be delivered within a short period (three days); the delay in delivery was comparably lengthy (over eighteen months); and the applicant had not shown that he had, in the meantime, made any relevant enquiries about it, with the result that his application was introduced to this Court more than two years after the final domestic decision.

4. *Worm v. Austria*, 29 August 1997, § 33, *Reports of Judgments and Decisions* 1997-V.
5. *Artur Parkhomenko v. Ukraine*, no. 40464/05, § 70, 16 February 2017.
6. *Papachelas v. Greece* [GC], no. 31423/96, § 30, ECHR 1999-II.
7. *Ölmez v. Turkey* (dec.), no. 39464/98, 1 February 2005.

"CORE" RIGHTS

Right to life (Article 2)

Applicability

The judgment in *Nicolae Virgiliu Tănase v. Romania*[8] clarified whether, when there has been a car accident causing life-threatening injuries, the State's procedural obligations are to be drawn from Articles 2, 3 or 8.

Obligation to protect life

The judgment in *Fernandes de Oliveira v. Portugal*[9] concerned the nature of the substantive obligations under Article 2 owed to a voluntary psychiatric patient, as well as the length of the proceedings (procedural limb of Article 2).

The applicant's adult son, A.J., had a history of serious mental illness as well as of addiction to alcohol and prescription drugs. He was hospitalised on a voluntary basis on several occasions in a psychiatric hospital ("the HSC"). During his last stay (necessitated by a suicide attempt with prescription drugs), his initial restrictive regime was relaxed; he was then allowed home, only to be subsequently readmitted following excessive alcohol intake. Two days later A.J. left the HSC without permission, jumped in front of a train and died. The applicant complained under Article 2 of a failure to protect her son and under Article 6 of the length of her civil action against the HSC. The Grand Chamber found no violation of Article 2 as regards the substantive aspect and that there had been a violation of the procedural aspect of that Article.

(i) The judgment is interesting because the Grand Chamber clarified the content of the positive obligations – two, in the present case – on the State as regards the care of psychiatric patients at risk of suicide in hospital.

In the first place, and as recently clarified in *Lopes de Sousa Fernandes v. Portugal*[10] as regards medical negligence, the State has a positive obligation to put in place an effective regulatory framework compelling

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8. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Effective investigation), Article 3 (Applicability and Inhuman or degrading treatment), Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

9. *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 January 2019.

10. *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, 19 December 2017.

hospitals to adopt appropriate measures for the protection of patients' lives. Secondly, the Court imposes, in certain circumstances, a positive obligation to take preventive operational measures to protect an individual from the criminal acts of others and from himself[11] (*Osman v. the United Kingdom*[12]), an obligation extended to cases concerning detainees (*Keenan v. the United Kingdom*[13], and *Renolde v. France*[14]) and involuntary psychiatric patients (*Hiller v. Austria*[15]). The Grand Chamber extracted and listed the factors that the case-law indicated were relevant in applying the *Osman* test and assessing the suicide risk of a detainee which could trigger the need to take preventive measures: a history of mental-health problems; the gravity of the mental illness; previous attempts to commit suicide or self-harm; suicidal thoughts or threats; and signs of physical or mental distress. The Grand Chamber considered that both obligations were applicable to the case in question and, further, that both had been complied with. It noted in particular as follows:

(a) The manner in which the regulatory framework had been implemented did not give rise to a violation of Article 2. It is worth noting that the Grand Chamber agreed that the approach of the HSC – where patients' rights were restricted as little as possible and there existed a therapeutic desire to create an open regime – was in line with international standards[16] developed in recent years, and it endorsed the view expressed in *Hiller*[17] that a more intrusive regime could have violated Articles 3, 5 or 8. It also found the three surveillance measures in the HSC for voluntary patients to be adequate. These included: a

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11. As described in paragraph 125 of the judgment, "whether the authorities knew or ought to have known that A.J. posed a real and immediate risk of suicide and, if so, whether they did all that could reasonably have been expected of them to prevent that risk by putting into place the restrictive measures available ... The Court will bear in mind the operational choices which must be made in terms of priorities and resources in providing public healthcare and certain other public services in the same way as it bears in mind the difficulties involved in policing modern societies ...".

12. *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

13. *Keenan v. the United Kingdom*, no. 27229/95, ECHR 2001-III.

14. *Renolde v. France*, no. 5608/05, ECHR 2008 (extracts).

15. *Hiller v. Austria*, no. 1967/14, 22 November 2016.

16. UN General Assembly Resolution 46/119 on the protection of persons with mental illness and the improvement of mental health care, 17 December 1991, UN Doc. A/RES/46/119; the Convention on the Rights of Persons with Disabilities (CRPD), 2515 UNTS 3, as well as CRPD Committee Guidelines and statement of the OHCHR on Article 14 of the CRPD; UN Human Rights Committee General Comment No. 35 on Article 9 of the ICCPR; and Report of 2 April 2015 of the UN Special Rapporteur on the right to the enjoyment of the highest attainable standard of physical and mental health.

17. *Hiller*, cited above, §§ 54-55.

regular daily timetable with monitoring of presence at key times; a more restrictive regime if required; and an emergency procedure (for example, restraint procedures) if necessary. Finally, the applicant had been able to have recourse to a judicial system: despite its excessive length (see below), "nothing ... suggest[ed] a systemic deficiency in the functioning of the judicial system which denied the applicant an effective review of her civil claim".

(b) As to the application of the *Osman* operational obligation in this context, two aspects are worth noting. In the first place, the Grand Chamber confirmed for the first time that the positive obligation to take preventive operational measures extends to *voluntary* patients (it had already been recognised that it extended to involuntary patients, see above). While the Court reached this finding by noting that all psychiatric patients are vulnerable, with any form of hospitalisation involving a certain level of necessary restraint, the Grand Chamber did nuance its findings by adding that "the Court, in its own assessment, may apply a stricter standard of scrutiny" in the case of involuntary patients. Secondly, the Court went on to apply the *Osman* test by measuring the care and decisions of the HSC against the five factors noted above. Drawing heavily on domestic expert reports and decisions, the Court found that it had not been established that the HSC knew or ought to have known that there was an immediate risk to A.J.'s life in the days before his death. In particular, the Court accepted that, while a risk of suicide could not be excluded in inpatients such as A.J., whose psychopathological conditions were based on a multiplicity of diagnoses, the immediacy of the risk could vary and the Court endorsed the approach of the HSC, which was to vary the monitoring regime in place in accordance with these changes based on a philosophy which optimised patient freedom, patient responsibility and thus their chances of discharge. There being therefore no established "real and immediate risk", it was not necessary to proceed to examine the second limb of the *Osman* test, namely whether or not preventive measures had been required.

(ii) The applicant also complained that her civil action against the hospital was excessively long. She had originally relied on Article 6 § 1 in that respect and the Grand Chamber recharacterised this complaint under the procedural limb of Article 2 (*Radomilja and Others v. Croatia*[18]), finding a violation of this provision on the basis of the excessive length of the proceedings alone. As to whether it must be shown that that delay impacted on the effectiveness of the proceedings before it can

18. *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, 20 March 2018.

constitute a violation of the procedural limb of Article 2 (see *Mustafa Tunç and Fecire Tunç v. Turkey*[19], and, for example, *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*[20]), the Grand Chamber relied on paragraph 219 of *Lopes de Sousa Fernandes* (cited above):

> This is why the Court has held that, in Article 2 cases, particularly in those concerning proceedings instituted to elucidate the circumstances of an individual's death in a hospital setting, the lengthiness of proceedings is a strong indication that the proceedings were defective to the point of constituting a violation of the respondent State's positive obligations under the Convention, unless the State has provided highly convincing and plausible reasons to justify the length of the proceedings (see, for example, *Bilbija and Blažević v. Croatia*, no. 62870/13, § 107, 12 January 2016).

The Grand Chamber went on to find that the applicant's civil action was excessively long – a strong indicator therefore of defective proceedings – and that the Government had not provided "convincing and plausible" reasons to justify the delay. The importance of avoiding delay was explained (the passage of time affecting witness memory and the importance of ensuring deficiencies are remedied quickly and thereby avoided in the future), before it concluded that there had been a violation of the procedural limb of Article 2.

In *Olewnik-Cieplińska and Olewnik v. Poland*[21] the Court applied the principles developped in *Osman v. the United Kingdom*[22] in the context of a kidnapping.

Mr Olewnik was brutally kidnapped in 2001. He was detained and ill-treated for over two years and subsequently murdered, probably in September 2003, following the handover of a ransom. His body was discovered in 2006. A number of gang members were ultimately convicted by final judgment in 2010. The investigation into the crime, including allegations against certain investigating police officers, was still continuing. The applicants, who were the father and brother of the deceased, mainly complained under the substantive limb of Article 2 that Mr Olewnik's death had resulted from the authorities' failure to investigate effectively his kidnapping and thus to protect his life.

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19. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 31, 14 April 2015.
20. *Sarbyanova-Pashaliyska and Pashaliyska v. Bulgaria*, no. 3524/14, §§ 41-44, 12 January 2017.
21. *Olewnik-Cieplińska and Olewnik v. Poland*, no. 20147/15, 5 September 2019.
22. *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII.

The Court found that there had been a violation of the substantive limb (failure to investigate adequately the kidnapping and protect his life) of Article 2 of the Convention as well as of its procedural limb (failure to investigate after his death).

The judgment is of interest as this is the first time the Court has applied the principles initially set out in its *Osman* judgment to the circumstances surrounding the death of an individual following his or her kidnapping.

The *Osman* principles identify, it is to be recalled, the actual and constructive knowledge ("that the authorities knew or ought to have known at the time, of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party") that can give rise to a positive obligation on the State "to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk" (*Osman*, § 116). The two issues to be resolved in the present case were therefore whether the kidnapping and prolonged abduction gave rise to a "real and immediate risk" and, if so, whether the authorities demonstrated the commitment necessary to find Mr Olewnik and to identify the perpetrators as swiftly as possible in order to safeguard his life.

(i) As to the risk to Mr Olewnik's life, the Court noted that the Government had agreed that, in cases of kidnapping for ransom, it had to be assumed that the life and health of the victim was at risk. Statistics showed the serious nature of kidnappings in Poland, and abundant blood samples had been found in Mr Olewnik's home. In addition, that risk assessment was not necessarily dependent on whether or not the kidnappers had communicated their intention to harm the person held. Moreover, the immediacy of the risk to the victim, to be understood as referring mainly to the gravity of the situation and the particular vulnerability of the victim of kidnapping, did not diminish with time: on the contrary, it endured for years and thereby increased the victim's torment and the risk to his health and life, which risk was therefore considered to have remained imminent throughout the entire period of his imprisonment.

The authorities therefore knew or should have known of the existence of a real and immediate risk to the health and life of Mr Olewnik from the moment of his disappearance and throughout his abduction.

(ii) As to whether the authorities fulfilled the positive obligation under Article 2 to protect Mr Olewnik's life by doing all that could reasonably be expected of them, the Court was assisted by extensive evidence regarding the investigations and by the fact that investigative

errors had been well documented. In particular, the Parliamentary Inquiry Committee had conducted an "impressive investigation" into the actions of the police, prosecutors and other public authorities, concluding that "visible sluggishness, errors, recklessness and a lack of professionalism" resulted in the failure to discover the perpetrators and ultimately in Mr Olewnik's death. Such was the scale of the deficiencies that the Committee was led to explore the hypothesis that public officials had cooperated with the kidnapping gang and certain of the policing mistakes were the subject of criminal prosecution. The Court found that the facts clearly indicated that the domestic authorities failed to respond with the level of commitment required in a case of kidnapping and prolonged abduction and, further, that there had clearly been a link between the long list of omissions and errors perpetuated over the years and the failure to advance the investigation while Mr Olewnik had still been alive.

There had therefore been a breach of the State's obligation to safeguard the life of the victim and thus a violation of Article 2 of the Convention under its substantive limb.

(iii) It is worth noting that the Court's response to these questions in the applicants' favour was facilitated by the particularly serious facts of the present case. Indeed, the Court reiterated that its conclusions had taken into account the "particularly high risk factors" in the case (Mr Olewnik had been brutally kidnapped, ransom money had been exchanged, and years had passed without his release) and the "particularly large" extent to which the domestic system had malfunctioned.

Effective investigation[23]

Güzelyurtlu and Others v. Cyprus and Turkey[24] concerned the duty of Contracting States to cooperate in transnational investigations.

The case concerns the investigation into the murder in January 2005 of three Cypriot nationals of Turkish Cypriot origin in the part of Cyprus controlled by the Cypriot government. The suspects fled to the "Turkish Republic of Northern Cyprus" (the "TRNC"). Parallel investigations were conducted by Cypriot and "TRNC" authorities. The Cypriot authorities identified eight suspects: domestic and European arrest warrants were issued and Red Notice requests were sent to Interpol. The "TRNC" authorities arrested all of the suspects by the end of January 2005

23. See also, under Article 2 (Right to life – Obligation to protect life) above, *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, 31 January 2019, and *Olewnik-Cieplińska and Olewnik v. Poland*, no. 20147/15, 5 September 2019.

24. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019.

but released them some weeks later. The Cypriot authorities refused to surrender the case file to the "TRNC" authorities, seeking rather to obtain the suspects' surrender from the "TRNC" through mediation (United Nations Peacekeeping Force in Cyprus – UNFICYP) and then through extradition requests (to the Turkish embassy in Athens), which were returned without reply. Since then both investigations were at an impasse. The applicants (the victims' relatives) complained under Articles 2 and 13 of the failure of both Turkey and Cyprus to cooperate in the investigation.

The Grand Chamber found that Cyprus had not breached Article 2 (procedural limb) as it had used all means reasonably available to it to obtain the suspects' surrender/extradition from Turkey (paragraphs 241-45) and that it had not been under an obligation to submit its case file or to transfer the proceedings to the "TRNC" or to Turkey (paragraphs 246-55). However, it found that Turkey had breached Article 2 (procedural limb) on account of its failure to cooperate with Cyprus and, in particular, for not providing a reasoned reply to the extradition requests submitted by its authorities (paragraphs 258-66).

The Grand Chamber has developed in this judgment certain novel and important principles concerning the duty of Contracting States to cooperate in the context of transnational criminal investigations.

(i) The case gave the Grand Chamber the opportunity to clarify its case-law on the issue of jurisdiction (Article 1) and compatibility *ratione loci* of an Article 2 complaint (procedural limb) where the death occurs outside the jurisdiction of the respondent State. Since the deaths occurred in territory controlled by and under the jurisdiction of Cyprus, Turkey maintained that it had no "jurisdictional link" with the victims. The Grand Chamber found that there was a jurisdictional link to Turkey, on two grounds:

(a) The Grand Chamber established the principle that the institution of investigation/proceedings concerning a death which occurred outside the jurisdiction of that State is sufficient to establish a jurisdictional link for the purposes of Article 1 between that State and the victim's relatives who later brought Convention proceedings. The Court interestingly drew in this connection on Article 2 cases in which it had already followed a similar approach, either explicitly (*Aliyeva and Aliyev v. Azerbaijan*[25]) or implicitly (*Gray v. Germany*[26]). The Court also relied *mutatis mutandis* on the approach previously followed in an Article 6 case concerning a civil

25. *Aliyeva and Aliyev v. Azerbaijan*, no. 35587/08, §§ 56-57, 31 July 2014.
26. *Gray v. Germany*, no. 49278/09, 22 May 2014.

action (*Markovic and Others v. Italy*[27]), emphasising the separate and detachable nature of the procedural obligation arising out of Article 2 (*Šilih v. Slovenia*[28]) capable of binding a State even when the death had occurred outside its jurisdiction.

(b) The Grand Chamber also clarified that, if no investigation or proceedings were instituted in respect of a death outside a respondent State's jurisdiction, the Court would have to determine whether a jurisdictional link could in any event be established. Although the procedural obligation under Article 2 would in principle only be triggered for the State under whose jurisdiction the deceased was to be found, "special features" in a given case would justify a departure from this approach, according to the principles laid down in *Rantsev v. Cyprus and Russia*[29].

Each of these two grounds was sufficient for the Court to establish a jurisdictional link to Turkey, engaging therefore its free-standing procedural obligation to investigate in compliance with Article 2: the "TRNC" authorities had instituted a criminal investigation under its domestic law; and "special features" existed related to the situation in Cyprus, based on the fact that the murder suspects were known to have fled to the part of Cypriot territory which was under the effective control of Turkey, namely the "TRNC", therefore preventing Cyprus from fulfilling its Convention obligations.

(ii) This is the first time that the Court has found a violation of Article 2 under its procedural limb on the sole basis of a failure to cooperate with another State, the case allowing the Grand Chamber to define and develop therefore the duty to cooperate as a component of the procedural obligation under Article 2. After reviewing the cases in which the Court addressed an obligation to cooperate in a cross-border or transnational context under Article 2 (paragraphs 223-28), the Court found as follows:

> 232. ... In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.

27. *Markovic and Others v. Italy* [GC], no. 1398/03, §§ 54-56, ECHR 2006-XIV.
28. *Šilih v. Slovenia* [GC], no. 71463/01, § 159, 9 April 2009.
29. *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010 (extracts).

> 233. The Court accordingly takes the view that Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case ...

The Court noted, however, that this obligation to cooperate could only be one of means, not of result:

> 235. ... This means that the States concerned must take whatever reasonable steps they can to cooperate with each other, exhausting in good faith the possibilities available to them under the applicable international instruments on mutual legal assistance and cooperation in criminal matters. ...

> 236. ... Therefore, the procedural obligation to cooperate under Article 2 should be interpreted in the light of international treaties or agreements applicable between the Contracting States concerned, following as far as possible a combined and harmonious application of the Convention and those instruments, which should not result in conflict or opposition between them ... In this context, the procedural obligation to cooperate will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments.

Applying these principles to the specific context of extradition and in support of the finding of a violation of the duty to cooperate by Turkey, the Court interestingly noted that the obligation to cooperate under Article 2 should be read in the light of the European Convention on Extradition[30] (in particular Article 18 thereof) and should therefore entail for a State an obligation to examine and provide a reasoned reply to any extradition request from another Contracting State regarding suspects wanted for murder or unlawful killings who are known to be present in its territory or within its jurisdiction.

(iii) Lastly, the Court took into account a special feature of the present case: the duty to cooperate involved a Contracting State and a *de facto* entity under the effective control of another Contracting State.

In such a situation, and in the absence of formal diplomatic relations between the two Contracting States involved, the Court might be

30. European Convention on Extradition, ETS 24.

required to examine the informal or *ad hoc* channels of cooperation used by the States concerned outside the cooperation mechanisms foreseen by the relevant international treaties, while at the same time being guided by the provisions of those treaties as an expression of the norms and principles applied in international law. This led the Court to examine whether Cyprus and Turkey had taken all reasonable steps to cooperate with one another within the framework of the UNFICYP mediation, as well as in the light of the provisions of the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters[31] (Council of Europe Conventions ratified by both respondent States), irrespective of whether those treaties applied to the specific circumstances of the case and to the situation in northern Cyprus.

As to the extent of the cooperation required under Article 2 with *de facto* entities, the Court considered that supplying the whole investigation file to the "TRNC" with the possibility that the evidence would be used for the purposes of trying the suspects there would go beyond mere cooperation between police or prosecuting authorities (contrast *Ilaşcu and Others v. Moldova and Russia*[32]) and would amount in substance to the transfer of the criminal case by Cyprus to the "TRNC" courts. In such a specific situation, the duty to cooperate under Article 2 could not have required Cyprus to waive its criminal jurisdiction over a murder committed in its controlled area in favour of the courts of a *de facto* entity set up within its territory. However, the Court did not address in those findings the more general issue of cooperation in criminal matters with *de facto* or unrecognised entities and its lawfulness under international law, in particular with regard to the principle of non-recognition (as codified in Article 41 § 2 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[33]).

In *Nicolae Virgiliu Tănase v. Romania*[34], the Court set out the procedural obligations on a State following a car accident in which an individual sustains life-threatening injuries.

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31. European Convention on Mutual Assistance in Criminal Matters, ETS 30.

32. *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, §§ 177 and 345, ECHR 2004-VII.

33. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

34. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Applicability) above and Article 3 (Applicability and Inhuman or degrading treatment),

The applicant had been in a car accident on a public road and sustained life-threatening injuries. A criminal investigation was initiated and discontinued three times, on the last occasion because it was time-barred. The applicant was a civil party to those criminal proceedings. In the Convention proceedings he mainly complained under Articles 3, 6 and 13 of the conduct of the criminal investigation and the manner in which the investigating authorities had treated him. The Grand Chamber examined those complaints also under Articles 2 and 8 of the Convention. As regards the conduct of the investigation, the Grand Chamber found the complaints under Articles 3 and 8 incompatible *ratione materiae*, that Article 2 applied but had not been breached, that there was no need also to examine the effectiveness of the investigation under Article 13, and that the length of the investigation did not exceed the reasonable-time requirement set down by Article 6 of the Convention. It also found the applicant's complaint under Article 3 as regards his treatment by the authorities during the investigation to be inadmissible. There was also no violation of Article 6 as regards his complaint of a lack of access to a court for the determination of his civil rights.

The judgment is noteworthy because it clarifies, when there has been a car accident causing life-threatening injuries, whether the State's procedural obligations are to be drawn from Articles 2, 3 or 8. The Court's findings were informed by two key elements: the incident was unintentional and there was no suggestion of a failure by the State to adopt an adequate legal framework to ensure safety and reduce risk on the roads.

The complaints under Articles 3 and 8 were therefore declared incompatible *ratione materiae* with the provisions of the Convention.

The Grand Chamber explained that Article 2 would apply to a non-fatal road accident if "the activity involved was dangerous by its very nature and put the life of the applicant at real or imminent risk ... or if the injuries the applicant had suffered were seriously life-threatening". The injury was to be assessed in terms of the "the seriousness and after-effects" of the injuries, examples of which were provided in the judgment. As to the risk assessment, the Grand Chamber emphasised the importance of an adequate regulatory framework to ensure road safety. The less evident the risk from the activity, the more significant the level of injuries became. In the present case, irrespective of whether driving could be considered a particularly dangerous activity, the

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Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

applicant's injuries were considered sufficiently severe as to amount to a serious danger to his life so that Article 2 applied.

As to the content of the procedural obligation under Article 2, the Court reiterated its general approach that, in circumstances of life-threatening injuries inflicted unintentionally, the obligation only required that the legal system afford a remedy in the civil courts and not that a criminal investigation be opened, although this did not prevent domestic law from providing recourse to a criminal investigation in such circumstances. The Grand Chamber then gave further guidance. Where it was "not clearly established from the outset" that death resulted from an accident or other non-intentional act and where the hypothesis of unlawful killing was at least arguable on the facts, Article 2 required that a criminal investigation attaining a minimum level of effectiveness be conducted in order to shed some light on the circumstances of death or the life-threatening injuries, such investigation to be initiated by the authorities as soon as they became aware of the accident. Once it was established by that initial investigation that the death or life-threatening injury was not intentional, the civil remedy would be regarded as sufficient.

In the present case, a criminal investigation had been initiated and was found by the Court not to be deficient. It could not therefore be said that the legal system, as it applied in the present case, had failed to deal adequately with the applicant's case so that there had been no violation of Article 2 of the Convention.

The scope of a State's procedural obligation to cooperate with another State investigating a murder committed within the latter's jurisdiction was the subject of the judgment in *Romeo Castaño v. Belgium*[35].

The applicants' father was killed in a terrorist attack carried out by ETA in Spain in 1981. Three persons were later convicted and sentenced. A fourth, N.J.E., escaped justice and was living in Belgium. The Belgian courts on two occasions refused to execute European arrest warrants (EAWs) issued by the Spanish authorities in respect of N.J.E. Relying on reports of the CPT (2012) and the UN Human Rights Committee (2015), the Belgian courts expressed doubts as to whether the requesting State's regime of incommunicado detention as applied to persons suspected of terrorism-related offences was compatible with the protection of N.J.E.'s human rights.

35. *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019.

The applicants alleged in the Convention proceedings that Belgium was in breach of its obligations under Article 2 of the Convention by preventing Spain from prosecuting N.J.E. The Court found for the applicants. The judgment is noteworthy for the following reasons.

In the first place, the Court had to decide whether the applicants came within the jurisdiction of Belgium *ratione loci*. The respondent State had argued that there was no jurisdictional link between it and the murder of their father. Belgium had never opened an investigation of its own motion into the murder, and the fact that N.J.E. had fled to Belgium and lived there was not sufficient to create such a link. The Court disagreed. Importantly, it observed that although the Article 2 procedural obligation attached in principle to the Contracting State within whose jurisdiction the death occurred, the existence of "special features" could create a procedural obligation for a third Contracting State, even if that State had not itself initiated an investigation into the death (see, in this connection, *Rantsev v. Cyprus and Russia*[36], as confirmed in *Güzelyurtlu and Others v. Cyprus and Turkey*[37]). It noted that the following special features were present in the applicants' case: N.J.E. had fled to Belgium and lived there; Belgium and Spain had undertaken to cooperate with each other on criminal matters within the framework of the EAW; and Spain, acting within that framework, had requested Belgium to surrender N.J.E. For the Court, those "special features" meant that Belgium assumed a procedural obligation under Article 2 to cooperate with the Spanish authorities in their efforts to investigate N.J.E.'s involvement in the murder of the applicants' father on their territory.

Secondly, as to the scope of Belgium's procedural obligation to cooperate, the Court drew heavily on the Grand Chamber's reasoning in paragraphs 232 to 236 of its judgment in *Güzelyurtlu and Others* (paragraph 81 of the instant judgment), including the following principle: the procedural obligation to cooperate will only be breached in respect of a State required to seek cooperation if it has failed to trigger the proper mechanisms for cooperation under the relevant international treaties; and, in respect of the requested State, if it has failed to respond properly or has not been able to invoke a legitimate ground for refusing the cooperation requested under those instruments.

Thirdly, it is of particular interest that the Court had to address the two highlighted issues in the context of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender

36. *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 243-44, ECHR 2010 (extracts).

37. *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, § 190, 29 January 2019.

procedures between Member States – the relevant instrument of cooperation in the instant case. Examining each of the issues in turn, it found that Belgium had responded properly to Spain's request for cooperation. Importantly, it observed that the Belgian courts had not applied "automatically and mechanically" the mutual-trust principle underpinning the EAW system (see, in this connection, *Avotiņš v. Latvia*[38], and *Pirozzi v. Belgium*[39]). Those courts had reflected on the possible risk that N.J.E.'s Article 3 rights would be breached if she were to be held in incommunicado detention following her surrender to Spain, and had concluded that such a risk existed. Accepting that Article 3 considerations could constitute a "legitimate ground" for refusing a request for cooperation, the Court then examined the question whether there was a sufficient factual basis to justify the domestic courts' perceived risk of ill-treatment. On that issue, it observed that the Belgian courts failed to apprise themselves of the situation in Spain in 2016 regarding the placement of terrorist suspects in incommunicado detention. In its view, the courts should have used the most up-to-date information, rather than relying on the 2012 CPT and the 2015 UNHRC reports. Furthermore, it was significant that Belgium, like other countries, had in the past, and without hesitation, surrendered suspected ETA members to Spain within the framework of the EAW system. Importantly, Belgium had failed to seek further information from Spain regarding the conditions under which N.J.E. would be detained if surrendered. Such information would have allowed the Belgian authorities better to assess whether there was a real risk that N.J.E.'s Article 3 rights would be infringed in the event of her surrender.

Prohibition of torture and inhuman or degrading treatment and punishment (Article 3)

Applicability

In *Nicolae Virgiliu Tănase v. Romania*[40] the applicant had been involved in a car accident on a public road and sustained life-threatening injuries.

The judgment is noteworthy because it clarifies whether, when there has been a car accident causing life-threatening injuries, the State's procedural obligations are to be drawn from Articles 2, 3 or 8.

38. *Avotiņš v. Latvia* [GC], no. 17502/07, § 116, 23 May 2016.

39. *Pirozzi v. Belgium*, no. 21055/11, § 62, 17 April 2018.

40. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Applicability and Effective investigation) above, and Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

The Grand Chamber declared the complaints under Articles 3 and 8 incompatible *ratione materiae* with the provisions of the Convention. The Court's findings were informed by two key elements: the incident was unintentional and there was no suggestion of a failure by the State to adopt an adequate legal framework to ensure safety and reduce risk on the roads.

The Grand Chamber found that injury following an accident which was the result of mere chance or negligence could not amount to "treatment" to which the individual had been "subjected". More particularly, Article 3 treatment is "in essence, albeit not exclusively, characterised by an intention to harm, humiliate or debase an individual, by a display of disrespect for or diminution of his or her human dignity, or by the creation of feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance". No such elements featured in the applicant's case. Accordingly, while intention would generally be only one of the elements relevant to the assessment of the applicability of Article 3, a lack of intention in an accident context would render Article 3 inapplicable. Considering this approach to be the correct one, the Grand Chamber distanced itself from previous cases where Article 3 had been applied to accidents due to the severity of the injury sustained (*Kraulaidis v. Lithuania*[41] and *Mažukna v. Lithuania*[42]).

The Grand Chamber also found no violation of Article 3 as concerns the manner in which the applicant had been treated by the investigating authorities during the criminal investigation into the accident.

Inhuman or degrading treatment

The judgment in *Nicolae Virgiliu Tănase v. Romania*[43] concerned a car accident on a public road in which a person had sustained life-threatening injuries.

A criminal investigation had been initiated and discontinued three times, on the last occasion because it was time-barred. The applicant was a civil party to those criminal proceedings. In the Convention proceedings he complained of the manner in which the investigating authorities had treated him. The Grand Chamber found no violation of Article 3 as concerns the manner in which the applicant had been

41. *Kraulaidis v. Lithuania*, no. 76805/11, 8 November 2016.

42. *Mažukna v. Lithuania*, no. 72092/12, 11 April 2017.

43. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Applicability and Effective investigation) and Article 3 (Applicability) above, and Article 6 § 1 (Reasonable time) and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

treated by the investigating authorities during the criminal investigation into the accident.

The Government had argued that the complaint under Article 3 concerning the manner in which the applicant had been treated by the investigating authorities was incompatible *ratione materiae*. The Grand Chamber did not agree and rejected this complaint as manifestly ill-founded, thereby clarifying the Court's case-law on the subject. The approach, whereby the Court takes into account the manner in which an investigation has been conducted in order to examine whether that constituted inhuman treatment, had developed mainly in respect of relatives of disappeared persons (*Kurt v. Turkey*[44], *Çakıcı v. Turkey*[45] and *Varnava and Others v. Turkey*[46]). The judgment goes on to usefully detail those other "exceptional situations" to which the Court has extended that approach, including situations such as the detention and deportation of an unaccompanied minor asylum-seeker (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*[47]), allegations of sexual abuse in a family environment (*M.P. and Others v. Bulgaria*[48]) and the removal of tissue from a deceased's body (*Elberte v. Latvia*[49]).

In *Tomov and Others v. Russia*[50], the Court set out the criteria to be met in order for the transport of prisoners to comply with Article 3.

The applicant prisoners complained of the inhuman and degrading conditions in which they had been transported by road and rail and of the lack of effective means of redress for their complaints. Of relevance is the fact that the Court had already found in more than fifty judgments against the respondent State that it was in breach of Article 3 on account of prisoners' transport conditions (acute lack of space, inadequate sleeping arrangements, lengthy journeys, restricted access to sanitary facilities, faulty heating and ventilation, etc.). In many of these cases it had also found a breach of Article 13 because of the absence of an effective remedy.

In the instant case, the Court once again found that there had been a breach of Articles 3 and 13. It is noteworthy that the Court, with reference

44. *Kurt v. Turkey*, 25 May 1998, *Reports of Judgments and Decisions* 1998-III.
45. *Çakıcı v. Turkey* [GC], no. 23657/94, ECHR 1999-IV.
46. *Varnava and Others v. Turkey* [GC], nos. 16064/90 and 8 others, ECHR 2009.
47. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, ECHR 2006-XI.
48. *M.P. and Others v. Bulgaria*, no. 22457/08, 15 November 2011.
49. *Elberte v. Latvia*, no. 61243/08, ECHR 2015.
50. *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 37 (Striking out) and Article 46 (Execution of judgments) below.

to the approach taken by the Grand Chamber when dealing with prison overcrowding in the case of *Muršić v. Croatia*[51], outlined the approach it would take in its consideration of transport-of-prisoners cases, thereby sending a signal to the respondent State on how to bring its domestic law into line with Article 3 standards.

With that in mind, the Court indicated among other factors that a strong presumption of a violation would arise when detainees were transported in conveyances offering less than 0.5 sq. m of space per person. In the case of overnight travel by rail, every detainee had to have his or her own place to sleep. It also set out a number of aggravating considerations, including low ceiling height, restricted access to toilets and to drinking water or food during long trips, and sleep deprivation. It further set out a number of circumstances which, of themselves, would not give rise to a violation of Article 3. It observed, for example, that a short or occasional transfer (for example, one or two transfers, not exceeding thirty minutes each) may not reach the threshold of severity under Article 3 but more than one or two transfers would constitute a "continuing situation" and their overall effect had to be assessed.

It is further significant that, on this occasion, and having regard to the respondent State's modest progress in the execution of its earlier judgments, the Court decided to engage with the respondent State on the urgent need for remedial action to deal with what it found to be a structural problem relating to the inhuman conditions of transport of prisoners.

Degrading treatment[52]

The judgment in *Rooman v. Belgium*[53] concerned a mentally ill person who was sentenced to a term of imprisonment and detained in a psychiatric institution where the personnel could not communicate with him in his native language (namely German, the only one of Belgium's three official languages that he spoke). Relying on Articles 3 and 5, the applicant complained of not having received the appropriate psychiatric treatment due to the unavailability of German-speaking therapists.

The judgment contains a comprehensive review of the Court's case-law under Article 3 on the medical treatment of ill and vulnerable

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51. *Muršić v. Croatia* [GC], no. 7334/13, §§ 136-41, 20 October 2016.

52. See also, under Article 3 (Expulsion), *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019, and, under Article 5 § 1 (Deprivation of liberty), *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, 21 November 2019.

53. *Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019. See also under Article 5 § 1 (e) (Right to liberty and security – Persons of unsound mind) below.

detainees. The Court also clarified the relationship between Articles 3 and 5 as regards the assessment of the adequacy of the medical treatment. As regards communicating with foreign detainees undergoing treatment for mental-health issues, the Court clarified its case-law on the linguistic element with a view to assessing whether the appropriate pysychiatric care had been provided.

Khan v. France[54] concerned the obligation to protect unaccompanied foreign minors exposed to degrading living conditions.

The applicant, an unaccompanied Afghan aged between 11 and 12, spent almost seven months in conditions of squalor in the Calais region in the hope of reaching England. It would appear that it was never his intention to apply for asylum status in France. During this period, he lived in makeshift huts in deplorable conditions alongside thousands of other migrants trying to cross the English Channel. Individuals and families living in the shanty towns which grew up in the Calais region lacked among other things adequate shelter, security, food, basic hygiene and access to healthcare. Non-governmental organisations eventually made a successful application to a children's judge on behalf of the applicant (and other minors) to require the French authorities to take the applicant into care. According to the authorities it proved impossible to enforce this measure since the applicant did not contact them and he could not be located. The applicant eventually succeeded in reaching England. In the Convention proceedings he essentially contended that the authorities had not done everything that could reasonably be expected of them to ensure his welfare. The Court agreed and found that there had been a breach of Article 3. The following aspects of the judgment are noteworthy.

The applicant's particular plight had not come to the authorities' attention prior to the decision of the children's judge. He was unknown to the authorities up until that date. He had not sought asylum and he had not been in immigration detention awaiting expulsion. The applicant's situation therefore differed from that of the applicant in *Rahimi v. Greece*[55], also an unaccompanied foreign minor. In that case, the Court found a breach of Article 3 because the authorities had released the applicant from immigration detention pending his expulsion from the territory, effectively leaving him to fend for himself on the

54. *Khan v. France*, no. 12267/16, 28 February 2019.
55. *Rahimi v. Greece*, no. 8687/08, 5 April 2011.

streets. Importantly, in the instant case the Court stressed the extreme vulnerability of the applicant, a child living for months in precarious conditions and at all times exposed to the threat of physical, including sexual, violence. The authorities had not made sufficient efforts to identify unaccompanied minors, such as the applicant, in the makeshift encampments, although their presence there was well documented. Importantly, the Court, as in other cases concerning migrants (see, for instance, *Muskhadzhiyeva and Others v. Belgium*[56]; *M.S.S. v. Belgium and Greece*[57]*; Rahimi*, cited above; *Kanagaratnam v. Belgium*[58]; and *Tarakhel v. Switzerland*[59]), had regard in this connection to the findings of domestic bodies (such as the Defender of Rights and the National Consultative Commission on Human Rights) and international bodies (such as the Special Representative of the Secretary General of the Council of Europe on Migration and Refugees and UNICEF).

Furthermore, the Court was not persuaded that the authorities had reacted decisively to the decision of the children's judge. It accepted the difficulties which faced them in identifying and locating the applicant in the encampments and further accepted that those difficulties had been compounded by the applicant's lack of cooperation. However, it remained the case that the focus of the case was the plight of a vulnerable child exposed over several months to degrading, dangerous and precarious living conditions. Even if the respondent State had not created those conditions, it nevertheless had an obligation under Article 3 to protect the applicant from being subjected to them.

Inhuman or degrading punishment

Marcello Viola v. Italy (no. 2)[60] concerned a life prisoner who was required to cooperate with the authorities in their fight against Mafia crime in order to obtain a review of his sentence and a possibility of release.

The applicant was convicted in various trials for Mafia-related crimes, including active leadership of a Mafia clan, kidnapping and murder. At the close of the second trial, the court sentenced him to life imprisonment. He alleged under Article 3 of the Convention that his life sentence was neither *de jure* nor *de facto* reducible since the so-called "*ergastolo ostativo*" regime was applied to him on account of the offences of which

56. *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010.
57. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.
58. *Kanagaratnam v. Belgium*, no. 15297/09, 13 December 2011.
59. *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014 (extracts).
60. *Marcello Viola v. Italy (no. 2)*, no. 77633/16, 13 June 2019. See also under Article 46 (Execution of judgments) below.

he was convicted. He argued that other categories of life prisoners had the prospect of release when they had served twenty-six years of their sentence, and benefited from a possibility of release in advance of that term by demonstrating their suitability for reintegration into society. Referring to the relevant provisions of the Criminal Code, the applicant claimed that he could only work towards rehabilitation and thus enjoy a review of his sentence – and a prospect of release – if he succeeded in rebutting the statutory presumption that he no longer had any links with the Mafia and was therefore no longer to be considered dangerous. To do that, he contended, he had to cooperate with the authorities by becoming an informant, thereby putting his and his family's lives at risk of reprisals.

The Court found for the applicant and held that there had been a breach of Article 3 given that the sentencing regime applied to him amounted to an excessive curtailment of his Convention right to a review of his life sentence with the possibility of release. The judgment is noteworthy given the manner in which the Court applied to the circumstances of the applicant's case the principles it had developed in *Vinter and Others v. the United Kingdom*[61], as summarised recently in *Murray v. the Netherlands*[62] and *Hutchinson v. the United Kingdom*[63]. In *Hutchinson*, the Court observed (paragraph 43) among other things that

> ... respect for human dignity requires prison authorities to strive towards a life sentenced prisoner's rehabilitation ... It follows that the requisite review must take account of the progress that the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds ...

Importantly, the Court had due regard to the reasons which led the legislator to place the onus on offenders such as the applicant to prove to the authorities' satisfaction that they had broken their links with the Mafia, failing which they continued to be considered dangerous and ineligible on that account for a review of their sentence. According to the Government, the very nature of Mafia membership justified the imposition of a requirement that a prisoner cooperate with the authorities in the fight against Mafia-related crime as proof of his or her rehabilitation, and the prisoner had a choice in the matter.

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61. *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09 and 2 others, ECHR 2013 (extracts).

62. *Murray v. the Netherlands* [GC], no. 10511/10, 26 April 2016.

63. *Hutchinson v. the United Kingdom* [GC], no. 57592/08, 17 January 2017.

The Court was not however persuaded that the choice between cooperating and refusing to cooperate could be considered voluntary. It referred in this connection to the applicant's fears for his and his family's security if he were to provide assistance to the authorities. In addition, it observed that it could not be excluded that a prisoner's decision to collaborate was in reality nothing more than an opportunistic move on his or her part aimed at securing a sentence review, rather than signifying a genuine resolve to put an end to his or her ties with the Mafia. The Court was particularly concerned by the fact that the law did not afford prisoners such as the applicant other ways of proving that they had severed for good their links with the Mafia. It noted that the applicant had successfully followed the reintegration-into-society programme offered by the prison that, had he been an ordinary life prisoner, would have entitled him to a five-year reduction of his sentence. However, by refusing to cooperate with the authorities, the progress the applicant had made while in prison could not be taken into consideration, with the result that he was denied the possibility of demonstrating that his continued imprisonment was no longer justified on legitimate penological grounds.

It is of interest that the Court in its concluding remarks under Article 46 indicated that Italy should provide for the possibility of introducing a review of the life sentence imposed on individuals sentenced under the same regime as the applicant. Such review should take account of the progress prisoners have made during their incarceration towards their rehabilitation. The domestic authorities should assess on that basis whether or not a particular prisoner has severed his or her links with the Mafia, rather than automatically equating a failure to cooperate with continuing dangerousness. Importantly, the Court stressed that Article 3 required a prospect of release but not a right to be released if the prisoner was deemed at the close of the review to still be a danger to society.

Expulsion

Ilias and Ahmed v. Hungary[64] concerned the short-term confinement of asylum-seekers in a land border transit zone and their subsequent removal to a presumed-safe third country without examining their asylum claims on the merits.

The applicants, Bangladeshi nationals, arrived in the transit zone situated on the land border between Hungary and Serbia and applied for asylum. Although their expulsion was ordered on the same day, they spent twenty-three days in the transit zone pending examination of

64. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019. See also under Article 5 § 1 (Deprivation of liberty) below.

those claims. Their asylum requests were rejected as inadmissible. The domestic authorities considered Serbia to be a safe third country that could examine their asylum requests on the merits. They were escorted out of the transit zone and crossed the border back to Serbia, without physical coercion. The Grand Chamber found a violation of Article 3 as regards their expulsion to Serbia and no violation of this provision as regards their conditions of confinement in the transit zone.

The Grand Chamber judgment is noteworthy because the Court, drawing on *M.S.S. v. Belgium and Greece*[65], has clarified the nature of the duty of the expelling State when removing an asylum-seeker to a third country without an examination on the merits of the asylum claim.

The Court began by observing that where a Contracting State seeks to remove an asylum-seeker to a third country without examining the asylum request on the merits, the State's duty not to expose the individual to a real risk of treatment contrary to Article 3 is discharged in a different manner from that in cases of return to the country of origin. In the latter situation the expelling authorities examine whether the asylum claim is well founded and, accordingly, the alleged risks in the country of origin. In the former situation, the main issue is the adequacy of the asylum procedure in the receiving third country.

A State removing asylum-seekers to a third country may legitimately choose not to deal with the merits of asylum requests; however, in that case, it cannot know whether those persons risk treatment contrary to Article 3 in the country of origin or are simply economic migrants not in need of protection. Therefore, in all such cases, regardless of whether the receiving third country is a member State of the European Union or a State Party to the Convention, it is the duty of the removing State to examine thoroughly whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure protecting him or her against *refoulement*, namely, against being removed, directly or indirectly, to his or her country of origin without a proper evaluation of the risks he or she faces from the standpoint of Article 3. If it is established that the existing guarantees in this regard are insufficient, Article 3 gives rise to a duty not to remove the asylum-seekers to the third country concerned.

The Grand Chamber went on to clarify the questions by which it would determine whether the removing State had fulfilled this procedural obligation to assess the asylum procedures of a receiving third State, namely:

(a) Whether the authorities of the removing State had taken into account the available general information about the receiving third

65. *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, ECHR 2011.

country and its asylum system in an adequate manner and of their own initiative; and

(b) Whether the applicants had been given a sufficient opportunity to demonstrate that the receiving State was not a safe third country in their particular case. In applying this test, the Court indicated that any presumption that a particular country is "safe", if it has been relied upon in decisions concerning an individual asylum-seeker, must be sufficiently supported at the outset by the above analysis.

Importantly, the Court specified that it is not its task to assess whether there was an arguable claim about Article 3 risks in the country of origin, this question only being relevant where the expelling State had dealt with these risks. The Court thus distanced itself from its approach in certain previous cases where it had included text mentioning that the applicants' claim about risks in their countries of origin were arguable, even though the removing State in those cases had not examined them on the merits.

On the facts of the present case, the Court found that Hungary had failed to discharge its procedural obligation under Article 3 having regard, in particular, to the fact that there was an insufficient basis for its decision to establish a general presumption concerning Serbia as a safe third country; that the expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of a denial of access to an effective asylum procedure in Serbia and of a summary removal from Serbia to North Macedonia and onward to Greece; and that the Hungarian authorities had exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return with relevant guarantees.

The Grand Chamber also clarified an important issue concerning the scope of cases before it in referral proceedings by finding that complaints that had not been rejected as inadmissible or declared admissible by the Chamber were considered to fall within the scope of the case before the Grand Chamber.

Right to liberty and security (Article 5)

Deprivation of liberty (Article 5 § 1)

Ilias and Ahmed v. Hungary[66] concerned the short-term confinement of asylum-seekers in a land border transit zone before their removal to a third country.

66. *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019. See also under Article 3 (Expulsion) above.

The applicants, Bangladeshi nationals, arrived in the transit zone situated on the land border between Hungary and Serbia and applied for asylum. Although their expulsion was ordered on the same day, they spent twenty-three days in the transit zone pending examination of those claims. The zone measured 110 sq. m and was fully guarded at all times. Inside it, the applicants could spend time outdoors, communicate with other asylum-seekers and receive visits. Their asylum requests were rejected as inadmissible. The domestic authorities considered Serbia to be a safe third country that could examine their asylum requests on the merits. They were escorted out of the zone and crossed the border back to Serbia, without physical coercion. The Grand Chamber rejected the applicants' complaints under Article 5 §§ 1 and 4 as incompatible *ratione materiae* with the Convention provisions.

The Grand Chamber judgment is noteworthy in that the Court has, for the first time, examined the applicability of Article 5 to the confinement of asylum-seekers in a transit zone located on the land border between two member States of the Council of Europe.

The Grand Chamber examined the question, in particular, whether the confinement of the applicants in this land border transit zone amounted to a restriction on liberty of movement or to a deprivation of liberty. It set down the factors to be taken into account in this respect: (a) the applicants' individual situation and their choices; (b) the applicable legal regime of the respective country and its purpose; (c) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants at the time of the events; and (d) the nature and degree of the actual restrictions imposed on or experienced by the applicants. The Grand Chamber found that Article 5 did not apply. In particular, the applicants' confinement did not exceed the maximum duration set by domestic law or what was strictly necessary to verify whether their wish to enter Hungary to seek asylum could be granted. Furthermore, while their freedom of movement had been restricted to a very significant degree (in a manner similar to that characteristic of certain types of light-regime detention facilities), their liberty had not been limited unnecessarily or to an extent or in a manner unconnected to the examination of their asylum claims.

Importantly, the Court distinguished cases concerning confinement in airport transit zones (notably, *Amuur v. France*[67]) from the present case where it was in practice possible to walk to the border and cross into Serbia, a country bound by the Geneva Convention Relating to the

67. *Amuur v. France*, 25 June 1996, *Reports of Judgments and Decisions* 1996-III.

Status of Refugees. The applicants' fears about forfeiting their asylum claims in Hungary or deficiencies in the asylum procedures in Serbia were not considered sufficient alone to render their stay involuntary and to bring Article 5 into play. The Convention could not be read as linking the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3. Where the sum of all other relevant factors did not point to a situation of a *de facto* deprivation of liberty and it was possible for asylum-seekers, without a direct threat to their life or health known by or brought to the attention of the authorities at the relevant time, to return to the third country they had come from – as in the present case – Article 5 could not be seen as applicable to their situation in a land border transit zone where they awaited the outcome of their asylum claims because the authorities had not complied with their separate duties under Article 3 of the Convention.

It is noteworthy that in *Z.A. and Others v. Russia* (see below), which mainly concerned the confinement of asylum-seekers in an airport transit zone, Article 5 was found to be applicable.

In *Z.A. and Others v. Russia*[68] the Court examined the question whether the confinement of foreigners in an airport transit zone amounted to a deprivation of their liberty.

Travelling independently from each other, the four applicants entered Moscow's Sheremetyevo Airport. While they did not arrive in Russia because of a direct and immediate danger to their life or health, their arrival was nonetheless involuntary – either because they had been denied entry into a third country or because they had been deported to Russia. After being denied entry into Russia, they unsuccessfully applied for refugee status. In the meantime, they were held in the international transit zone of the airport for periods ranging from five months to one year and ten months, even though domestic rules granted asylum-seekers the right to be placed in temporary accommodation facilities. Although the applicants were largely left to their own devices within the transit zone, the size of the area and the manner in which it was controlled by the border guards meant that their freedom of movement was significantly restricted.

68. *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 others, 21 November 2019. See also above *Ilias and Ahmed v. Hungary*, delivered on the same day, which concerned the confinement of asylum-seekers in a land border transit zone for twenty-three days and their subsequent removal to a third country presumed safe without an examination on the merits of their asylum claims.

The Grand Chamber considered that, on account of the absence of a legal basis, their lengthy confinement in the airport transit area amounted to a *de facto* deprivation of liberty. It found a violation of Article 5 § 1 and of Article 3 on account of the authorities' failure to take care of their essential needs while so detained.

The judgment is noteworthy for the manner in which it addresses the issues of applicability of, and compliance with, Article 5 § 1 in the context of confinement of foreigners in airport transit zones.

(i) As a preliminary consideration, the Grand Chamber took the opportunity to stress that the right to have one's liberty restricted only in accordance with the law and the right to humane conditions if detained under State control are minimum guarantees that should be available to those under the jurisdiction of all member States, despite the mounting "migration crisis" in Europe.

(ii) In order to determine the applicability of Article 5 § 1, the Grand Chamber observed that it should proceed in a practical and realistic manner having regard to present-day conditions and challenges. Drawing upon its case-law concerning confinement in airport transit zones (*Amuur v. France*[69]; *Shamsa v. Poland*[70]; *Riad and Idiab v. Belgium*[71]; *Mogoş v. Romania*[72]; *Mahdid and Haddar v. Austria*[73]; *Nolan and K. v. Russia*[74]; and *Gahramanov v. Azerbaijan*[75]), the Grand Chamber set out four factors to be taken into consideration when assessing whether a measure of confinement of asylum-seekers amounts to a restriction on liberty of movement or to a deprivation of liberty, whether in an airport transit zone or, as the Grand Chamber noted, in reception centres for the identification and registration of migrants. These factors are as follows:

(a) The applicants' individual situation and their choices – whether they had requested admission to the State voluntarily and of their own initiative and whether they faced a direct and immediate danger to their life or health were relevant considerations in this respect.

(b) The applicable legal regime of the respective country and its purpose – in this respect, the Court pointed out that, absent other significant factors, the situation of an individual applying for entry and waiting for a short period for the verification of his or her right to enter

69. *Amuur v. France*, 25 June 1996, *Reports of Judgments and Decisions* 1996-III.
70. *Shamsa v. Poland*, nos. 45355/99 and 45357/99, 27 November 2003.
71. *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, 24 January 2008.
72 *Mogoş v. Romania* (dec.), no. 20420/02, 6 May 2004.
73. *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, ECHR 2005-XIII (extracts).
74. *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009.
75. *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, 15 October 2013.

cannot be described as a deprivation of liberty imputable to the State, since in such cases the State authorities have undertaken *vis-à-vis* the individual no other steps than reacting to his or her wish to enter by carrying out the necessary verifications.

(c) The relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants at the time of the events – importantly, the Court clarified that duration of itself should not affect the Court's analysis on the applicability of Article 5 in a decisive manner, as long as the applicant's stay in the transit zone did not exceed significantly the time needed for the examination of an asylum request and there were no exceptional circumstances. That is particularly so where the individuals benefited, while the asylum claims were pending, from procedural rights and safeguards against excessive waiting periods. A domestic rule limiting the length of stay in the transit zone is of significant importance in this regard.

(d) The nature and degree of the actual restrictions imposed on, or experienced by, the applicants.

On the facts of the instant case, the Grand Chamber found that the applicants had been deprived of their liberty within the meaning of Article 5 having regard, in particular, to the lack of any domestic legal provisions fixing the maximum duration of their stay; the largely irregular character of their stay in the airport transit zone; the excessive duration of such stay and considerable delays in the domestic examination of their asylum claims; the characteristics of the area in which they had been held; the control to which they had been subjected during the relevant period of time; and the fact that the applicants had had no practical possibility of leaving the zone.

(iii) As to the merits of their complaint under Article 5, and fully conscious of the difficulties member States experience during periods of massive arrivals of asylum-seekers at their borders, the Court indicated how to comply with the lawfulness requirement of Article 5 in this context. Subject to the prohibition of arbitrariness, this requirement may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal.

The Court further specified that Article 5 § 1 (f) does not prevent States from enacting domestic law provisions that formulate the grounds on which such confinement can be ordered with due regard to

the practical realities of a massive influx of asylum-seekers. In particular, sub-paragraph 1 (f) does not prohibit deprivation of liberty in a transit zone for a limited period on the ground that such confinement is generally necessary to ensure the asylum-seekers' presence pending the examination of their asylum claims or, moreover, on the ground that there is a need to examine the admissibility of asylum applications speedily and that, to that end, a structure and adapted procedures have been put in place at the transit zone.

As noted above, the finding of a violation of Article 5 § 1 in the present case flowed from the absence of any legal basis for the applicants' lengthy confinement in the transit zone.

Persons of unsound mind (Article 5 § 1 (e))

The judgment in *Rooman v. Belgium*[76] concerned the applicant's deprivation of liberty in a psychiatric institute. Since this detention served a dual role (social and therapeutic), the Court stated that "appropriate and individualised treatment" was a condition of its lawfulness.

The applicant, a German-speaking Belgian national, was sentenced for serious sexual and other offences. While in prison, he committed further offences and, based on expert reports, his detention in a psychiatric institution was ordered. Since 2004 he had therefore been detained in a "social protection facility" ("EDS") in the French-speaking region of Belgium: medical reports attested to a psychotic and paranoid personality representing a danger to society. He complained, under Articles 3 and 5, of the failure to provide him with the necessary psychiatric treatment in the EDS. The Chamber found that the applicant's detention without appropriate treatment due to the unavailability of German-speaking therapists for thirteen years (apart from some short periods) violated Article 3. However, it also found that this lack of treatment did not sever the link with the aim of his detention or render his detention unlawful, so that there had been no violation of Article 5.

Further to the delivery of the Chamber judgment, in August 2017 fresh efforts were made to provide the applicant with treatment in German. The Grand Chamber found a violation of Articles 3 and 5 given the lack of treatment prior to August 2017 and no violation of those Articles as regards the care proposed since then.

(i) The principal issue was whether Article 5 § 1 (e) had, in addition to its social role of ensuring the protection of society, a therapeutic one which required appropriate treatment to ensure the detention remained

76. *Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019. See also under Article 3 (Degrading treatment) above.

lawful. In its earlier judgments (*Winterwerp v. the Netherlands*[77], and *Ashingdane v. the United Kingdom*[78]), the Court had found that a right to appropriate treatment could not be derived from Article 5 § 1 (e): indeed, the former Commission stated that, while compulsory admission to a psychiatric hospital had to fulfil a "dual function, therapeutic and social", the Convention dealt only with the social function of protection in authorising the deprivation of liberty of a person of unsound mind (*Winterwerp v. the Netherlands*[79]). Later, beginning with *Aerts v. Belgium*[80], the case-law began to recognise a link between the lawfulness of a deprivation of liberty and the conditions of its execution so that it was the treatment received, rather than the aim of the detention facility, that was important[81]. This led to a series of judgments against Belgium[82] where the Court found the psychiatric wings of Belgian prisons inappropriate for the lengthy detention of mentally ill persons as they did not receive appropriate care and treatment for their conditions and were thus deprived of any realistic prospect of rehabilitation. That deficiency severed the necessary link with the purpose, and thus the lawfulness, of the detention, leading to a violation of Article 5 § 1.

The Grand Chamber confirmed in the present case that, in the light of these case-law developments and current international standards[83], the deprivation of liberty contemplated by Article 5 § 1 (e) can be considered to have a dual function: as well as the social function of protection emphasised in *Winterwerp* and *Ashingdane* (both cited above), it also has a therapeutic one so that the administration of "appropriate and individualised treatment" to such a detainee has become a condition of the lawfulness of that detention. The presence of "appropriate and individualised treatment" is therefore the "essential part" of a decision as

77. *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33.

78. *Ashingdane v. the United Kingdom*, 28 May 1985, Series A no. 93.

79. *Winterwerp v. the Netherlands*, no. 6301/73, Commission's report of 15 December 1977, § 84, Series B no. 31.

80. *Aerts v. Belgium*, 30 July 1998, § 49, *Reports of Judgments and Decisions* 1998-V.

81. *Hutchison Reid v. the United Kingdom*, no. 50272/99, §§ 52 and 55, ECHR 2003-IV, and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 139 and 141, 4 December 2018.

82. The four leading judgments: *L.B. v. Belgium*, no. 22831/08, 2 October 2012; *Claes v. Belgium*, no. 43418/09, 10 January 2013; *Dufoort v. Belgium*, no. 43653/09, 10 January 2013; and *Swennen v. Belgium*, no. 53448/10, 10 January 2013; eight judgments of 9 January 2014: *Van Meroye v. Belgium*, no. 330/09; *Oukili v. Belgium*, no. 43663/09; *Caryn v. Belgium*, no. 43687/09; *Moreels v. Belgium*, no. 43717/09; *Gelaude v. Belgium*, no. 43733/09; *Saadouni v. Belgium*, no. 50658/09; *Plaisier v. Belgium*, no. 28785/11; and *Lankester v. Belgium*, no. 22283/10; as well as, more recently, the pilot judgment in *W.D. v. Belgium*, no. 73548/13, 6 September 2016.

83. Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, and Recommendation Rec(2004)10 of the Committee of Ministers to member States concerning the protection of the human rights and dignity of persons with mental disorder.

to whether a detaining facility is an appropriate one for such detention. The treatment should aim to improve the individual's condition and reduce his dangerousness with a view to his release.

(ii) The Grand Chamber also clarified the relationship between Articles 3 and 5 as regards the assessment of the adequacy of medical treatment for mentally ill detainees. The question of a continued link between the purpose of detention and the conditions in which it is carried out (Article 5 § 1 (e)) and the question of whether those conditions attain a particular threshold of gravity (Article 3) were considered by the Grand Chamber to be of "differing levels of intensity". Accordingly, a finding of no violation of Article 3 does not automatically lead to no violation of Article 5 § 1 and, equally, a care path that could violate Article 3 could also result in a finding that there has been a violation of Article 5 § 1 on the same grounds.

(iii) The applicant, who had legal capacity, had not been receptive to the treatment plan offered since August 2017 and domestic law prohibited its imposition. Drawing on Recommendation Rec(2004)10[84], the Grand Chamber confirmed that, while his disorder weakened his discernment and rendered him vulnerable, this did not imply that treatment was to be imposed. Rather, treatment was to be proposed, thereby including the applicant as much as possible in developing his care path and providing him with a choice of treatment. Having regard to the significant efforts made by the authorities to provide the applicant with access to treatment which was, on the face of it, coherent and adapted to his situation, to the short period during which they had an opportunity to implement these treatment measures (since August 2017), and to the fact that the applicant had not always been receptive to them, the Grand Chamber was able to conclude that the treatment available since August 2017 corresponded to the therapeutic aim of the applicant's compulsory confinement.

(iv) Finally, it was accepted that the applicant had not received treatment because it was not available in German and it is interesting to note how the Court dealt with this language issue under both Articles 3 and 5, with a view to assessing its relevance in any future cases concerning the provision of treatment to foreign detainees.

The Grand Chamber emphasised that the Convention did not guarantee a detainee the right to treatment in his or her own language. As regards Article 3, the question was whether, "in parallel with other factors, necessary and reasonable steps were taken to guarantee

84. Recommendation Rec(2004)10, cited above.

communication that would facilitate the effective administration of appropriate treatment". However, it was accepted that as regards psychiatric treatment "the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment, but only where other factors [did] not make it possible to offset the lack of communication". In the context of Article 5, the Social Protection Board (which had committed the applicant to compulsory confinement) had confirmed his right to speak, be understood and to receive treatment in German, a national language in Belgium, so the finding of a violation of Article 5 in the present case could be confined to those very particular facts.

Speediness of review (Article 5 § 4)

The judgment in *Aboya Boa Jean v. Malta*[85] provided an answer to the question whether procedural irregularities in the review of lawfulness automatically result in a violation of Article 5 § 4.

The applicant was in immigration detention awaiting examination of his asylum application (the Court found the detention to be justified under Article 5 § 1 (f)). Under Maltese law an automatic review of the lawfulness of immigration detention had to take place within seven working days of an individual's placement in detention, and the review period could be extended by a further seven working days. In the applicant's case, and contrary to domestic-law requirements, the automatic review was only carried out after a period of twenty-five calendar days had elapsed. This was due to difficulties in convening the Immigration Appeals Board within the first seven working days (and also because the applicant had requested an adjournment when the Board was ready to consider the case on the twentieth calendar day following his detention, which was within the maximum domestic time-limit of seven plus seven working days).

The applicant complained in the Convention proceedings that the Article 5 § 4 procedure in his case had not been speedy because of the breach of the statutory deadline obliging the Board to carry out an automatic review of the lawfulness of his detention. The Court disagreed and found that there had been no breach of Article 5 § 4.

The judgment is noteworthy as regards the treatment of the nature and scope of Article 5 § 4 proceedings, the Court observing in this connection that the forms of judicial review which satisfy the requirements of Article 5 § 4 may vary from one domain to another "and will depend on the type of deprivation of liberty in issue". Importantly, it pointed out (paragraph 76) that

85. *Aboya Boa Jean v. Malta*, no. 62676/16, 2 April 2019.

> [i]t is not excluded that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4 (see *Megyeri v. Germany*, 12 May 1992, § 22, Series A no. 237-A). ...

One such requirement is that a review must be speedy. On that issue, and having regard to its case-law in this area, the Court observed that the question whether the periods of time which elapse between automatic periodic reviews complied with the speediness requirement had to be determined in the light of the circumstances of each case, bearing in mind the nature of the detention (for example, detention after conviction, detention of persons of unsound mind, detention pending expulsion or, as in the instant case, detention pending the determination of an asylum request).

The Court then went on to address the impact of the procedural irregularities identified above on the Article 5 § 4 proceedings. Importantly, it stressed that although a deprivation of liberty may be found to be unlawful under Article 5 § 1 because it was not "in accordance with a procedure prescribed by law", breaches of mandatory procedural requirements did not of themselves give rise to a breach of Article 5 § 4. The decisive question in the applicant's case (he did not contest the Board's independence and impartiality or the fairness of the proceedings) was whether the review satisfied the speediness test. It observed on the facts of the applicant's case (paragraph 80) that

> ... while under Article 5 § 1 detention which is not compliant with domestic law induces a violation of that provision, a breach of time-limits for automatic reviews established in law does not necessarily amount to a violation of Article 5 § 4, if the proceedings by which the lawfulness of an applicant's detention were examined were nonetheless decided speedily. The Court notes that, in the present case, despite certain irregularities (the fact that the applicant did not have his initial automatic review within seven working days of the start of his detention as provided by domestic law, nor was this period extended in line with the regular practice) the time which elapsed until his first review, i.e. twenty running days – which due to a postponement became twenty-five running days – cannot be considered unreasonable.

Right to compensation (Article 5 § 5)

In *Porchet v. Switzerland*[86] the Court clarified its case-law on the concept of compensation ("*réparation*") within the meaning of Article 5 § 5

86. *Porchet v. Switzerland* (dec.), no. 36391/16, 8 October 2019.

and, in particular, whether a reduction in sentence can be regarded as "compensation".

The applicant was arrested for endangering life and driving a vehicle without a licence. He was placed in pre-trial detention in premises intended for police custody and was held there for eighteen days instead of the forty-eight hours authorised by law. The applicant was subsequently sentenced to a term of thirty-five months' imprisonment, part of which was suspended. In order to compensate for the sixteen days of detention in a police custody cell, the Criminal Court granted him a reduction in sentence of eight days. In the proceedings before the Swiss Federal Court and this Court, the applicant argued that he had a right under Article 5 § 5 to *monetary* compensation for his detention, which had been in breach of Article 5 § 1 of the Convention.

The Court held that the application was incompatible *ratione personae* with the provisions of the Convention.

This decision is noteworthy because the Court has made clear that the concept of "compensation" within the meaning of Article 5 § 5 is not to be understood solely in financial terms.

While the existing case-law was relatively sparse, some aspects were of relevance to this case:

– The Commission had previously found that, although the right to compensation under Article 5 § 5 was primarily financial, it could be broader in scope (*Bozano v. France*[87]). As to the amount, Article 5 § 5 did not guarantee a right to a certain amount of compensation (see, for instance, *Jeronovičs v. Latvia*[88]);

– Applying, by analogy, its case-law concerning compliance with the reasonable-time requirement from the standpoint of Article 6 § 1 (*Chraidi v. Germany*[89]) and Article 5 § 3 (*Ščensnovičius v. Lithuania*[90], and *Chraidi*, cited above) and the case-law concerning conditions of detention contrary to Article 3 (*Stella and Others v. Italy*[91]), the Court noted that a reduction in sentence could constitute compensation within the meaning of Article 5 § 5 on condition, firstly, that it was explicitly granted to afford redress for the violation in question and, secondly, that it had a measurable and proportionate impact on the sentence served by the person concerned (ibid., and, conversely, *Włoch v. Poland (no. 2)*[92]).

87. *Bozano v. France*, no. 9990/82, Commission decision of 15 May 1984, Decisions and Reports 34, pp. 119, 131.

88. *Jeronovičs v. Latvia* (dec.), no 547/02, 10 February 2009.

89. *Chraidi v. Germany*, no. 65655/01, § 24, ECHR 2006-XII.

90. *Ščensnovičius v. Lithuania*, no. 62663/13, § 92, 10 July 2018.

91. *Stella and Others v. Italy* (dec.), no. 49169/09, §§ 59-60, 16 September 2014.

92. *Włoch v. Poland (no. 2)*, no. 33475/08, § 32, 10 May 2011.

Accordingly, the Court held that, in view of the fact that the national authorities had acknowledged the violation in question and had afforded redress comparable to just satisfaction as provided for under Article 41 of the Convention (*Cocchiarella v. Italy*[93]), the applicant could no longer claim to be a victim of a violation of Article 5 § 5 of the Convention.

PROCEDURAL RIGHTS

Right to a fair hearing in civil proceedings (Article 6 § 1)

Applicability

In *Altay v. Turkey (no. 2)*[94] the Court ruled that oral communication between a lawyer and his or her client was a matter which falls within the notion of "private life" and is a "civil" right.

The applicant was serving a life sentence. Since September 2005 he had had to conduct his consultations with his lawyer in the presence of a prison officer. The measure was imposed by a court when it was discovered that the lawyer had acted in a manner incompatible with the standards of her profession by trying to send the applicant reading material which did not relate to his defence rights. The applicant alleged that the restriction of the privacy of his consultations with his lawyer was incompatible with his rights under Article 8 and that the domestic proceedings in which he had attempted to challenge this measure had not complied with the fairness requirements of Article 6 § 1 since, among other things, he had not been afforded an oral hearing. The Court agreed on both counts.

The judgment is noteworthy in that the Court ruled for the first time that an individual's oral communications with his or her lawyer in the context of legal assistance fallx within the scope of private life since the purpose of such interaction is to allow that individual to make informed decisions about his or her life.

It is also noteworthy that the Court's view of the nature of the lawyer-client relationship weighed heavily in its assessment of whether the applicant could rely on the civil limb of Article 6 to complain of the fairness of the proceedings which he brought to challenge the restriction. The Government argued that the restriction on the consultation with his lawyer was a preventive measure imposed in the interests of maintaining order and security within the prison and was therefore of a public-law nature. The Court did not agree and replied in the following terms (paragraph 68):

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93. *Cocchiarella v. Italy* [GC], no. 64886/01, § 72, ECHR 2006-V.

94. *Altay v. Turkey (no. 2)*, no. 11236/09, 9 April 2019. See also under Article 8 (Private life) below.

> ... To begin with, the Court finds it appropriate to refer to its findings under Article 8 of the Convention, namely that the lawyer-client confidentiality is privileged and that oral communication with a lawyer falls under the notion of "private life". Thus the substance of the right in question, which concerns the applicant's ability to converse in private with his lawyer, is of a predominately personal and individual character, a factor that brings the present dispute closer to the civil sphere. Since a restriction on either party's ability to confer in full confidentiality with each other would frustrate much of the usefulness of the exercise of this right, the Court concludes that private-law aspects of the dispute predominate over the public-law ones.

The Court's conclusion on the applicability of the civil limb of Article 6 in the applicant's case can be viewed as complementary to its existing case-law in which the Court has held in respect of proceedings instituted in the prison context that some restrictions on prisoners' rights fall within the sphere of "civil rights" (*De Tommaso v. Italy*[95]; *Enea v. Italy*[96]; and *Ganci v. Italy*[97]).

The Court's reasoning on the merits of the Article 6 complaint contains an interesting review of the case-law on the right to an oral hearing in the context of civil proceedings. In the applicant's case, it found that there were no exceptional circumstances which justified dispensing with an oral hearing in the impugned proceedings.

Reasonable time

In *Nicolae Virgiliu Tănase v. Romania*[98] the Court set out the procedural obligations on a State following a car accident in which an individual sustains life-threatening injuries.

The applicant was in a car accident on a public road and sustained life-threatening injuries. A criminal investigation was initiated and discontinued three times, on the last occasion because it was time-barred. The applicant was a civil party to those criminal proceedings. The Court found Article 2 to be applicable but that it had not been breached, that there was no need also to examine the effectiveness of the investigation under Article 13, and that the length of the investigation

95. *De Tommaso v. Italy* [GC], no. 43395/09, § 147, 23 February 2017.

96. *Enea v. Italy* [GC], no. 74912/01, § 119, ECHR 2009.

97. *Ganci v. Italy*, no. 41576/98, §§ 20-26, ECHR 2003-XI.

98. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Applicability and Effective investigation) and Article 3 (Applicability and Inhuman or degrading treatment) above, and Article 8 (Right to respect for one's private and family life, home and correspondence) below.

did not exceed the reasonable-time requirement set down by Article 6 of the Convention.

In the present case, a criminal investigation had been initiated and was found by the Court not to be deficient. It could not therefore be said that the legal system, as it applied in the present case, failed to deal adequately with the applicant's case so that there had been no violation of Article 2 of the Convention. Interestingly, and having found that the length of the investigation (over eight years) had not affected its effectiveness (*Mustafa Tunç and Fecire Tunç v. Turkey*[99]), the Grand Chamber examined this length issue separately under Article 6 (*Frydlender v. France*[100]), finding that it did not give rise to a violation of the reasonable-time requirement contained therein.

Presumption of innocence (Article 6 § 2)

In the decision in *Carrefour France v. France*[101] the Court ruled on the principle that punishment should only be applied to the offender in relation to the merger of one company into another.

Proceedings were brought against a subsidiary of the applicant company for anti-competitive practices. While the proceedings were under way, the applicant company decided to wind up its subsidiary without liquidating the business, thus taking it over as a going concern with all assets and liabilities. The applicant company thus replaced the merged company in respect of all its pending contracts and became the employer of its staff. Subsequently, in the competition proceedings, the applicant company was ordered to pay a civil fine of 60,000 euros in respect of acts imputable to its former subsidiary, whose business it had continued. The applicant company appealed, arguing that this fine breached the principle that punishment should only be applied to the offender. The Court of Cassation dismissed its appeal, taking the view that, as the merger had resulted in the economic and functional continuity of the former company, a judgment against the surviving company in respect of infringements committed in the context of the merged company's activity was not incompatible with that principle. The Court dismissed the application as manifestly ill-founded.

The decision is noteworthy as it was the first time that the Court had examined, in the light of the principle that punishment should only be applied to the offender, the specific situation of a merger of one

99. *Mustafa Tunç and Fecire Tunç v. Turkey* [GC], no. 24014/05, § 225, 14 April 2015.

100. *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII.

101. *Carrefour France v. France* (dec.), no. 37858/14, 1 October 2019.

company into the other, with the economic and functional continuity of the merged company.

The Court had previously had occasion to deal with this principle when examining the compatibility with Article 6 § 2 of a judgment against heirs who had been given fines of a criminal nature for acts of tax fraud that had been imputed to the deceased (*E.L., R.L. and J.O.-L. v. Switzerland*[102]; *A.P., M.P. and T.P. v. Switzerland*[103]; see also, for similar questions, *Estate of Nitschke v. Sweden*[104]; *Silickienė v. Lithuania*[105]; and *Lagardère v. France*[106]). Under Article 7, refusing to pierce the corporate veil of legal personality, the Grand Chamber has relied on that principle to find against the confiscation of the applicant companies' property for acts engaging the criminal liability of their directors (*G.I.E.M S.r.l. and Others v. Italy*[107]).

In the present case, the Court found that the imposition of a civil fine on the applicant company, on account of competition-distorting acts committed by the merged company prior to the merger, had not breached the principle that punishment should only be applied to the offender.

The Court observed that in the event of the merger of one company into another, the business of the merged company, with all its assets and liabilities, passed to the surviving company and its shareholders became shareholders of the latter. The economic activity that had formerly been carried on by the merged company, and which had constituted its core business, was thus continued by the company benefiting from the operation. As a result of the continuity from one company to another, the merged company was not really "another" in relation to the surviving company.

In other words, the situation brought about by the merger of one company into the other, entailing the economic and functional continuity of the merged company, constitutes an exception to the principle that punishment should only be applied to the offender.

The Court emphasised, like the Advocate General at the Court of Cassation, that an unconditional application of the principle in this context could render nugatory the economic liability of legal entities,

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102. *E.L., R.L. and J.O.-L. v. Switzerland*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V.

103. *A.P., M.P. and T.P. v. Switzerland*, 29 August 1997, *Reports of Judgments and Decisions* 1997-V.

104. *Estate of Nitschke v. Sweden*, no. 6301/05, § 52, 27 September 2007.

105. *Silickienė v. Lithuania*, no. 20496/02, § 51, 10 April 2012.

106. *Lagardère v. France*, no. 18851/07, § 77, 12 April 2012.

107. *G.I.E.M. S.r.l. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018.

which would be able to evade any pecuniary sanctions merely through operations such as mergers. The choice made in French law was therefore driven by the imperative of ensuring the effectiveness of pecuniary sanctions, which would be negated by the systematic application to legal entities of the principle that punishment should only be applied to the offender. The Court further noted that the approach of EU law in the field of competition law was similar, being driven by the same concerns: to avoid companies evading the Commission's sanctions by the mere fact that they had taken on a new identity following legal or organisational changes; and to ensure the effective implementation of the competition rules.

Defence rights (Article 6 § 3)

Adequate time and facilities for the preparation of his defence (Article 6 § 3 (b))

Sigurður Einarsson and Others v. Iceland[108] concerned a situation where the defence had been denied access to a mass of data and involvement in its electronic sifting by the prosecution when the latter was gathering relevant information for investigation.

The applicants occupied senior positions in a bank that collapsed in the wake of the 2008 banking crisis in Iceland. They were prosecuted for breach of trust or market manipulation and found guilty. Their defence was given access to the documents included in the investigation file, as well as to the material selected from that file and presented to the trial court. However, the applicants complained that the defence had not been given access to the vast amount of data collected indiscriminately by the prosecution and not included in the investigation file, comprising the particular category of data "tagged" as a result of searches using the Clearwell e-Discovery system. Furthermore, they maintained that the defence had been unable to have a say in the prosecution's electronic sifting of that data and had been denied the possibility of carrying out a Clearwell search in order to identify evidence that could potentially be exculpatory.

The judgment is noteworthy in three respects.

Firstly, it clarifies the content of the right to have adequate facilities for the preparation of the defence with regard to a vast volume of unprocessed material collected indiscriminately by the prosecution and *a priori* not relevant to the case. For the Court, the data in question

108. *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, 4 June 2019.

were more akin to any other evidence which might have existed but had not been collected by the prosecution at all than to evidence of which the prosecution had knowledge but which it refused to disclose to the defence. Since the prosecution had in fact not been aware of what the content of the mass of data was, and to that extent it had not held any advantage over the defence, the denial of access to such raw data was not a situation of withholding evidence or "non-disclosure" in the classic sense.

Secondly, regarding the processing or sifting of such raw material by the prosecution, the Court specified the nature of the procedural safeguards which should be in place so as to guard against the concealment of information of relevance to the defence. The Court stressed that a possibility of a review by a court was an important safeguard in determining whether access to data should be ensured. Also, an important safeguard in a sifting process would be to ensure that the defence was provided with an opportunity to be involved in the laying-down of the criteria for determining what might be relevant to the case. In particular, concerning access to the intermediate results of such sifting, for instance to the "tagged" data in question in the instant case, the Court emphasised that it would have been appropriate for the defence to have been afforded the possibility of conducting a search for potentially exculpatory evidence and that any refusal to allow the defence to have further searches of the "tagged" documents carried out would in principle raise an issue under Article 6 § 3 (b).

Finally, it is of interest that the Court took into account the following factors when assessing the overall fairness of the proceedings in issue:

– whether the applicants had pointed to any specific issue which could have been clarified by further searches;

– whether the applicants had formally sought a court order for access to the mass of data collected by the prosecution or for further searches to be carried out;

– whether they had suggested further investigative measures – such as a fresh search using specific keywords.

In the instant case, the Court found no breach of Article 6 §§ 1 and 3 (b) because the lack of access to the data in question was not such that the applicants had been denied a fair trial overall, since they had not provided any specification of the type of evidence they had been seeking and, importantly, it was open to them to seek a judicial review.

Other rights in criminal proceedings

No punishment without law (Article 7)

Parmak and Bakır v. Turkey[109] was about the retroactive application of more lenient changes to substantive criminal law and whether a broad interpretation of domestic law was "reasonably foreseeable".

In 2006 the applicants were convicted of membership of a terrorist organisation (they had met each other, disseminated flyers and possessed illegal periodicals and a manifesto). They were convicted under the Prevention of Terrorism Act (Law no. 3713), which was in force at the time of the impugned activities in 2002. This Law described "terrorism" as any act committed by means of pressure, force and violence, terror, intimidation, oppression or threat, with one or more of the listed political or ideological aims. The domestic courts also took into account the amended 2003 version of the Law, which narrowed the definition of "terrorism" by including the use of force and violence as well as other cumulative conditions. The domestic courts found that "force and violence" should be interpreted broadly and include situations where violence, although not used in the ordinary physical sense, was adopted as the goal of an organisation, as in the applicants' case. This requirement of "force and violence" was therefore found to be satisfied in their case because the texts which they had disseminated/possessed were so objectionable as to amount to "moral coercion" of the public. The Court found that there had been a violation of Article 7 of the Convention.

(i) The judgment is noteworthy because the Court has, for the first time, indicated that the principle recognised in *Scoppola v. Italy (no. 2)*[110] – the need to apply retroactively an intervening and more lenient criminal penalty – also extends to intervening favourable changes to substantive law. Indeed, in the present case, the Turkish courts had taken into account the new 2003 Law, in conjunction with its original version applicable in 2002, so the main issue for the Court was to assess the compatibility with Article 7 of the domestic courts' interpretation of those provisions in convicting the applicants.

(ii) This assessment is of interest because of the manner in which the Court examined whether the domestic courts' broad interpretation of domestic law was "reasonably foreseeable" for the purposes of Article 7 § 1 of the Convention. The Court applied a two-tier test.

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109. *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, 3 December 2019.
110. *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009.

In the first place, it had regard to whether the interpretation in question was the "resultant development of a perceptible line of case-law". There appeared to have been no comparable case in which an association had been deemed to be a terrorist organisation on the sole basis of the nature of its written declarations and in the absence of violent acts attributable to it. Nor were there any examples of domestic case-law that made use of the concept of "moral coercion" in the context of terrorist offences.

Secondly, it assessed whether the "application of the law in broader circumstances was nevertheless consistent with the essence of the offence" of membership of a terrorist organisation and, in particular, whether the text could be said to reasonably imply the concept of "moral coercion". In this regard, the fact that law-makers had chosen to single out the use of violence as a necessary element of the crime of terrorism in the later 2003 version of the Law supported the conclusion that actual violence or the intent to use such violence was central to the definition of the offence. Moreover, the Turkish Court of Cassation had clarified that, when assessing for the first time whether an organisation could be classified as terrorist, the domestic courts had to examine thoroughly the nature of the organisation, its purpose, whether it had adopted an action plan or similar operational measures and whether it had resorted to violence, or there was a credible threat to use violence, in pursuing that action plan. However, while the domestic courts had held that the organisation in question had not engaged in any violent acts or armed attacks, they had not addressed the question whether, beyond the mere proclamation of certain goals, it had adopted an action plan or any concrete preparatory steps for such a purpose. They had therefore failed to demonstrate that the cumulative elements of the offence of membership of a terrorist organisation, as construed by the Court of Cassation, were present in the applicants' cases. It was clear that the applicants had been convicted because of the political ideas and aspirations expressed in some of the documents found to be the product of the organisation in question.

The Court concluded that the domestic courts had chosen to exercise their judicial discretion in an expansive manner by adopting an interpretation that had been inconsistent with both prevailing national jurisprudence and the essence of the offence as defined by national law. While noting the difficulties and challenges associated with the fight against terrorism, the Court found that the domestic courts had infringed the reasonable limits of acceptable judicial clarification contrary to the guarantees of Article 7.

Right not to be tried or punished twice (Article 4 of Protocol No. 7)

In *Mihalache v. Romania*[111] the Court set out the criteria for determining whether a decision constitutes an "acquittal" or a "conviction" and whether it is "final".

The prosecution discontinued the criminal proceedings against the applicant for refusal to undergo biological testing to determine his blood alcohol level and imposed an administrative fine instead. The applicant did not contest that decision within the twenty-day time-limit laid down in domestic law and paid the fine. A few months later, considering that the administrative fine had been inappropriate, the higher-ranking prosecutor's office set aside the decision. The applicant was committed for trial and sentenced to a suspended term of one year's imprisonment.

The applicant complained in the Convention proceedings that he had been tried and convicted twice for the same offence, in breach of Article 4 § 1 of Protocol No. 7. He also submitted that the reopening of the proceedings against him had not been in conformity with the criteria set out in Article 4 § 2. The Grand Chamber found a breach of Article 4 of Protocol No. 7.

The judgment is noteworthy in four respects:

(i) The Court has, for the first time, defined the scope of the expression "acquitted or convicted" and laid down general criteria in this regard.

Firstly, judicial intervention is unnecessary for a decision to be regarded as an "acquittal" or a "conviction". Whereas the French version of Article 4 of Protocol No. 7 provides that the person concerned must have been "*acquitté ou condamné par un jugement*", the English version requires the person to have been "finally acquitted or convicted". The Court observed, however, that what matters in any given case is that the decision has been given by an authority participating in the administration of justice in the national legal system concerned, and that that authority is competent under domestic law to establish and, as appropriate, punish the unlawful behaviour of which an individual has been accused. The fact that the decision does not take the form of a judgment cannot call into question the accused's acquittal or conviction, since such a procedural and formal aspect cannot have a bearing on the effects of the decision.

Secondly, in order to determine whether a particular decision constitutes an "acquittal" or a "conviction", the Court will consider the actual content of the decision and assess its effects on the applicant's

111. *Mihalache v. Romania* [GC], no. 54012/10, 8 July 2019.

situation, in particular, whether his or her "criminal" responsibility has been established following an assessment of the circumstances of the case by an authority vested by domestic law with decision-making power enabling it to examine the merits of a case. The finding that there has been a determination as to the merits of a case will depend on the progress of the proceedings. In this respect, the Court may take into account the following factors:

– whether a criminal investigation has been initiated after an accusation has been brought against the person in question;

– whether the victim has been interviewed;

– whether the evidence has been gathered and examined by the competent authority;

– whether a reasoned decision has been given on the basis of that evidence; and

– whether a penalty has been ordered as a result of the behaviour attributed to the person concerned.

(ii) The Court also clarified the criteria to be taken into account in determining whether a decision is "final", deciding to interpret this term autonomously where this is justified by sound reasons. In order to decide whether a decision is "final" within the meaning of Article 4 of Protocol No. 7, it must be ascertained whether it is subject to an "ordinary remedy", that is, a remedy with a clear scope and procedure, available to the parties within a specified time-limit and thus satisfying the principle of legal certainty.

In the instant case, significantly, the Court did not question the possibility for a higher-ranking prosecutor's office to examine of its own motion, in the context of hierarchical supervision, the merits of decisions taken by a lower-level prosecutor's office. However, a possibility to reopen the proceedings and reconsider the merits of a decision without being bound by any time-limit did not constitute an "ordinary remedy". Only the remedy allowing the applicant to challenge the fine within twenty days was an "ordinary" one. Since the applicant did not avail himself of that remedy, the decision imposing a fine on him had become "final", within the autonomous Convention meaning of the term, on the expiry of the twenty-day time-limit, that is, well before the higher-ranking prosecutor's office exercised its discretion to reopen the criminal proceedings.

(iii) The Court also clarified that the conditions permitting the reopening of a case within the meaning of the exception set out in Article 4 § 2 of Protocol No. 7, such as the emergence of new or newly

discovered facts or the discovery of a fundamental defect in the previous proceedings, are alternative and not cumulative conditions.

(iv) Finally, the Court fleshed out the concept of "fundamental defect" within the meaning of Article 4 § 2 of Protocol No. 7. Only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening them to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law. Consequently, in such cases, a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion. However, in situations where a reopening of proceedings might work to the advantage of the accused, the nature of the defect must be assessed primarily in order to ascertain whether there has been a violation of the defence rights and therefore an impediment to the proper administration of justice.

Right to an effective remedy (Article 13) [112]

Ulemek v. Croatia [113] concerned the relationship between preventive and compensatory remedies for conditions of detention that breach Article 3 of the Convention.

The applicant served his prison sentence in two detention facilities in Croatia: Zagreb Prison and Glina State Prison. The circumstances of detention in each facility differed in terms of the prison regime applicable and the conditions of detention. As to the conditions of detention in Zagreb Prison, the applicant did not avail himself of the preventive remedy before the prison administration and/or the sentence-execution judge (which the Court had already found to be effective). As to the conditions in Glina State Prison, the applicant did use that remedy but, once his complaints were dismissed, he failed to complain to the Constitutional Court, which remedy the Court had already found to be an additional required step in the process of exhausting the preventive remedy for conditions of detention in Croatia. However, after his release from Glina State Prison, the applicant began a civil action for damages for allegedly inadequate conditions in both facilities. When that action was unsuccessful, he complained to the Constitutional Court which examined the overall period of his confinement in the two detention facilities and dismissed his complaint on the merits. The applicant

112. See also under Article 3 (Inhuman or degrading treatment) *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019.

113. *Ulemek v. Croatia*, no. 21613/16, 31 October 2019 (not final).

mainly complained under Articles 3 and 13 of the inadequate conditions of his detention in both prisons and of a lack of an effective remedy in that regard.

The case is noteworthy because it examines the relationship between preventive and compensatory remedies for inadequate conditions and, in particular, it explores whether using the preventive remedy could/should condition access to the compensatory one. In so doing, it provides a useful overview of the Court's case-law on remedies for conditions of detention.

(i) In examining whether the present applicant had exhausted domestic remedies, as well as his complaint under Article 13, the Court distinguished between cases where it had not found that the domestic system provided for an effective preventive remedy (in which case use of a compensatory remedy after release was sufficient) and cases where it had already found that both remedies existed. In this latter respect, the Court reasoned as follows:

> 86. [F]rom the perspective of the State's duty under Article 13, the prospect of future redress cannot legitimise particularly severe suffering in breach of Article 3 and unacceptably weaken the legal obligation on the State to bring its standards of detention into line with the Convention requirements ... Thus, given the close affinity of Articles 13 and 35 § 1 of the Convention, it would be unreasonable to accept that once a preventive remedy has been established from the perspective of Article 13 – as a remedy found by the Court to be the most appropriate avenue to address the complaints of inadequate conditions of detention – an applicant could be dispensed from the obligation to use that remedy before bringing his or her complaint to the Court ...
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> 87. Thus, normally, before bringing their complaints to the Court concerning the conditions of their detention, applicants are first required to use properly the available and effective preventive remedy and then, if appropriate, the relevant compensatory remedy.

The Court accepted that there might be instances in which the use of an otherwise effective preventive remedy would be futile in view of the brevity of the detention in inadequate conditions so that the only viable option would be a compensatory remedy, although, and as borne out by the relevant principles of the Court's case-law, the compensatory remedy should normally be used within six months of the end of the allegedly inadequate conditions of detention.

In the present case, and given that the Constitutional Court (the highest court in the State), had examined the merits of the applicant's

complaints of inadequate conditions of detention for the overall period of his confinement in both prisons, the Court did not consider that his complaints could be dismissed for a failure to exhaust domestic remedies. It also found his complaint under Article 13 to be manifestly ill-founded, confirming its case-law as to the existence of effective preventive and compensatory remedies for inadequate conditions of detention in Croatia.

(ii) As to the extent to which the above principles indicate the manner in which preventive and compensatory remedies for inadequate prison conditions could/should be organised within the meaning of Article 13, and are to be exhausted for the purposes of Article 35 § 1, the Court observed that, for the purposes of the latter provision, the above-noted findings were without prejudice to the possibility for domestic legal systems to provide for different arrangements as regards the use of remedies (namely, a State might not condition the compensatory remedy on exhaustion of the preventive one) and to provide for a longer statutory time-limit for the use of the compensatory remedy, in which case the use of the remedy is assessed according to the relevant domestic arrangements and time-limits.

In this regard, it is worth noting that, while the remedies adopted following certain pilot/lead cases have already been examined by the Court in follow-up decisions/judgments (in, for example, *Torreggiani and Others v. Italy*[114]; *Stella and Others v. Italy*[115]; *Varga and Others v. Hungary*[116]; *Domján v. Hungary*[117]; *Shishanov v. the Republic of Moldova*[118]; *Draniceru v. the Republic of Moldova*[119]; *Neshkov and Others v. Bulgaria*[120]; and *Atanasov and Apostolov v. Bulgaria*[121]), the remedies developed following other pilot/lead cases have yet to be reviewed by the Court in a follow-up case (for example, *Ananyev and Others v. Russia*[122], and *Rezmiveș and Others v. Romania*[123]).

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114. *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, 8 January 2013.
115. *Stella and Others v. Italy* (dec.), no. 49169/09, 16 September 2014.
116. *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, 10 March 2015.
117. *Domján v. Hungary* (dec.) no. 5433/17, 14 November 2017.
118. *Shishanov v. the Republic of Moldova*, no. 11353/06, 15 September 2015.
119. *Draniceru v. the Republic of Moldova* (dec.), no. 31975/15, 12 February 2019.
120. *Neshkov and Others v. Bulgaria*, nos. 36925/10 and 5 others, 27 January 2015.
121. *Atanasov and Apostolov v. Bulgaria* (dec.), nos. 65540/16 and 22368/17, 27 June 2017.
122. *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012.
123. *Rezmiveș and Others v. Romania*, nos. 61467/12 and 3 others, 25 April 2017.

OTHER RIGHTS AND FREEDOMS

Right to respect for one's private and family life, home and correspondence (Article 8)

Applicability

The judgment in *Nicolae Virgiliu Tănase v. Romania*[124] is noteworthy because it clarifies whether, when there has been a car accident causing life-threatening injuries, the State's procedural obligations are to be drawn from Articles 2, 3 or 8. The Court's findings were informed by two key elements: the incident was unintentional and there was no suggestion of a failure by the State to adopt an adequate legal framework to ensure safety and reduce risk on the roads.

As to Article 8, the Grand Chamber reiterated that the positive obligations on a State to protect the physical and psychological integrity of an individual in the sphere of relations between private individuals were subject to a threshold requirement (*Denisov v. Ukraine*[125]) and, further, that private life does not extend to activities which are of an essentially public nature (*Friend and Others v. the United Kingdom*[126]). Against that background, it outlined the particular elements of this case which rendered Article 8 inapplicable: driving was an essentially public activity; any risk was minimised by traffic regulations ensuring safety; and it did not concern a situation (such as violent acts or healthcare) where the State's positive obligation to protect physical or psychological integrity had been previously engaged. There was therefore no "particular aspect of human interaction or contact" which could attract the application of Article 8 of the Convention.

The complaint under Article 8 was therefore declared incompatible *ratione materiae* with the provisions of the Convention.

Private life

In response to the first request for an advisory opinion under Protocol No. 16 to the Convention, from the French Court of Cassation, the Court

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124. *Nicolae Virgiliu Tănase v. Romania* [GC], no. 41720/13, 25 June 2019. See also under Article 2 (Applicability and Effective investigation), Article 3 (Applicability and Inhuman or degrading treatment) and Article 6 § 1 (Reasonable time) above.

125. *Denisov v. Ukraine* [GC], no. 76639/11, 25 September 2018.

126. *Friend and Others v. the United Kingdom* (dec.), nos. 16072/06 and 27809/08, 24 November 2009.

delivered its opinion[127] in April 2019. The issue under consideration was the private life of a child born of surrogacy abroad and the recognition of the legal relationship between that child and the intended mother who has no genetic link to the child.

In *López Ribalda and Others v. Spain*[128] the Court developed its case-law concerning employees' right to respect for their private life in the workplace and the limits of the employer's right to conduct video-surveillance.

The applicants worked as cashiers and sales assistants in a supermarket. In order to investigate certain stock losses that had been noted, their employer decided to install surveillance cameras. Some of the cameras, positioned to film the shop's entrances and exits, were in plain sight, while others, directed towards the tills and the checkout areas, were hidden. Domestic law provided a formal and explicit statutory framework which obliged a person responsible for a video-surveillance system, even in a public place, to give prior information to the persons being monitored by the system. However, the applicants were only notified about the cameras that were visible and not about those that were hidden; some of the applicants could potentially have been filmed throughout their working day. The video-surveillance lasted for ten days and ceased when video-footage showed that the applicants had been stealing items. They were dismissed on the basis of the video-recordings in question.

The Grand Chamber found that there had been no violation of Article 8 of the Convention.

The judgment is noteworthy because it transposes the principles set down in *Bărbulescu v. Romania*[129] to an employer's video-surveillance measures in the workplace, some of those principles having been drawn from the earlier decision in *Köpke v. Germany*[130], a factually similar case to the present one.

In so doing, the Grand Chamber set down the following factors which must be taken into account when assessing the competing interests and proportionality of such video-surveillance measures:

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127. *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019. See also under Article 1 of Protocol No. 16 (Advisory opinions) below.

128. *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, 17 October 2019.

129. *Bărbulescu v. Romania*, no. 61496/08, 5 September 2017 (extracts).

130. *Köpke v. Germany* (dec.), no 420/07, 5 October 2010.

(i) Whether the employee has been notified of the possibility of video-surveillance measures being adopted by the employer and of the implementation of such measures – while in practice employees may be notified in various ways, depending on the particular factual circumstances of each case, the notification should normally be clear about the nature of the monitoring and be given prior to implementation.

It is of significance that the Court emphasised that this requirement of transparency and the ensuing right to information are fundamental in nature, particularly in the context of employment relationships, where the employer has significant powers with regard to employees and any abuse of those powers should be avoided. Therefore, only an overriding requirement, relating to the protection of significant public or private interests, could justify the lack of prior information.

On the other hand, the Court pointed out that the provision of information to the individual being monitored and its extent constitute just one of the criteria to be taken into account in order to assess the proportionality of a measure of this kind in a given case. However, if such information is lacking, the safeguards deriving from the other criteria will be "all the more important".

(ii) The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy – in this connection, any limitations in time and space and the number of people who have access to the results should be taken into account, as well as the level of privacy in the area being monitored.

Importantly, as regards the latter factor, the Court clarified that the expectation of privacy that an employee could reasonably have is very high in places that are private by nature, such as toilets or cloakrooms, where heightened protection, or even a complete ban on video-surveillance, is justified. It remains high in closed working areas such as offices. It is manifestly lower in places that are visible or accessible to colleagues or, as in the present case, to the general public.

(iii) Whether the employer has provided legitimate reasons to justify monitoring and the extent thereof – the more intrusive the monitoring, the "weightier" the justification required.

The Court specified that it could not accept that, generally speaking, the slightest suspicion of misappropriation or of any other wrongdoing on the part of employees might justify the installation of covert video-surveillance by the employer. It is the existence of a reasonable suspicion that serious misconduct has been committed and the extent of the losses identified that might constitute weighty justification. This is all the more so in a situation where the smooth functioning of a company is

endangered, not just by the suspected misbehaviour of one employee, but rather by the suspicion of concerted action by several employees, as this creates an atmosphere of mistrust in the workplace.

(iv) Whether it would have been possible to set up a monitoring system based on less intrusive methods and measures – in this connection, there should be an assessment in light of the particular circumstances of each case as to whether the aim pursued by the employer could have been achieved through a lesser degree of interference with the employee's privacy.

(v) The consequences of the monitoring for the employee subjected to it – account should be taken, in particular, of the use made by the employer of the results of the monitoring and whether such results had been used to achieve the stated aim of the measure.

(vi) Whether the employee has been provided with appropriate safeguards, especially where the employer's monitoring operations are of an intrusive nature – such safeguards may include the provision of information regarding the installation and extent of the monitoring to the employees concerned or staff representatives, a declaration of such a measure to an independent body or the possibility of making a complaint.

The Grand Chamber emphasised that these factors must be applied taking into account the specificity of the employment relations and the development of new technologies, which may enable measures to be taken that are increasingly intrusive into the private life of employees.

On the facts of the case, the Grand Chamber found that the intrusion into the applicants' privacy had not attained a high degree of seriousness and that the considerations justifying the video-surveillance had been weighty. Having regard also to the significant safeguards provided by the Spanish legal framework, including other remedies that the applicants had not used, the Grand Chamber concluded that the national authorities had not failed to fulfil their positive obligations under Article 8 of the Convention such as would overstep their margin of appreciation.

In the judgment in *Mifsud v. Malta*[131], the Court examined the obligation to provide a genetic sample in paternity proceedings.

The applicant was approximately 88 years of age when a woman (who was approximately 55 years of age at the time and believed the

131. *Mifsud v. Malta*, no. 62257/15, 29 January 2019.

applicant to be her father) began a civil action to obtain an order for a paternity test for, it was later accepted, moral and financial reasons. He defended the proceedings and the civil courts transferred the matter to the constitutional courts. Despite the mandatory nature of the domestic provision in question, those courts carried out a detailed review of the facts and, notably, of the competing interests involved before deciding to order the test.

The applicant complied, took the test, which confirmed he was the father, and the court ordered the amendment of the woman's birth certificate. The applicant complained under Article 8 of being required to undergo the paternity test. The Court concluded that there had been no violation of the Convention.

Most applications concerning paternity tests are brought by putative daughters or sons seeking to establish the identity of their parents, or by putative parents seeking to disavow or determine paternity. Such applications are therefore brought by the plaintiffs in the domestic proceedings.

This is the first time the Court has dealt with a complaint by a defendant in domestic proceedings on whom a paternity test was imposed and, in finding no violation, the first time the Court has accepted that one can indeed be compelled to give a genetic sample in disputed paternity proceedings. The question for the Court was whether the domestic courts asked the right questions and carried out an adequate balancing of the competing interests involved (the bodily integrity and privacy of the father versus the moral and financial interest of the child in knowing her biological reality). The Court found (paragraph 77) that

> in the present case, by ordering the applicant to undergo a DNA test, after having carried out the requisite balancing exercise of the interests at stake, in judicial proceedings in which the applicant participated via counsel of his choice and in which his rights of defence were respected on a par with those of his adversary, the domestic courts struck a fair balance between the interests of X. to have paternity established and that of the applicant not to undergo the DNA tests.

Given the existence in Maltese law of a mandatory requirement, the present judgment did not address the question of any positive obligation on a State to put in place such mandatory tests so that the position remains that outlined in *Mikulić v. Croatia*[132]: the protection of third parties may preclude their being compelled to undergo medical

132. *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I.

testing of any kind and a system with no means to compel an alleged father to undergo a DNA test could be considered compatible with the obligations deriving from Article 8.

It remains nevertheless interesting to note the reasoning of the Court in the present judgment. In particular, the Court observed that Article 8 did not "as such prohibit recourse to a medical procedure in defiance of the will of a suspect, or in defiance of the will of a witness, in order to obtain evidence" and that such methods – including, the Court noted, in the civil sphere – were "not in themselves contrary to the rule of law and natural justice". The Court went on to point out the "particular importance" in such cases of the legitimate aim of fulfilling the State's positive obligations arising under Article 8 *vis-à-vis* a child (seeking to discover the biological reality of his or her birth).

In *Beghal v. the United Kingdom*[133] the Court ruled on the authorities' stop, search and questioning powers at border controls pursuant to terrorism legislation.

The applicant was a French national, ordinarily resident in the United Kingdom. She visited her husband, also a French national, in a prison in Paris where he was awaiting trial on terrorism charges. On her return to the United Kingdom, the applicant was stopped by border officials at the airport. Acting pursuant to powers granted under Schedule 7 of the Terrorism Act 2000, exercisable in respect of persons passing through United Kingdom ports of entry and exit, the officials informed the applicant that they needed to speak to her to establish if she might be "a person concerned in the commission, preparation or instigation of acts of terrorism". She was further informed that she was not suspected of being a terrorist and that she was not under arrest. The applicant and her luggage were searched. The applicant refused to answer most of the questions put to her. After about two hours, she was told that she was "free to go". The applicant was subsequently charged with, among other offences, wilfully failing to comply with a duty under Schedule 7 by refusing to answer questions. The Supreme Court ultimately rejected the applicant's challenge to the measures applied to her[134].

133. *Beghal v. the United Kingdom*, no. 4755/16, 28 February 2019.

134. Schedule 7 had been amended before the Supreme Court's examination of the applicant's appeal. The amending legislation, adopted in 2014, provided for more stringent safeguards. The Supreme Court considered the applicant's complaints in the light of the amended Schedule 7 power.

In the Convention proceedings the applicant complained among other things that the exercise of the above-mentioned Schedule 7 powers breached her rights under Article 8 of the Convention. The Court agreed with the applicant, finding that, in the absence of adequate safeguards, the interference with her rights was not "in accordance with the law". The following points are noteworthy.

In the first place, the Court accepted (and the Government conceded) that there had been an interference with the applicant's right to respect for her private life. Significantly, the Court distinguished the applicant's situation from "the search to which passengers uncomplainingly submit at airports" (*Gillan and Quinton v. the United Kingdom*[135]), finding that the Schedule 7 powers exercised in the applicant's case were clearly wider than the immigration powers to which travellers might reasonably expect to be subjected.

Secondly, the Court situated its analysis of the impugned powers in the context of the legitimate need of States to combat international terrorism and the importance of controlling the international movement of terrorists, reiterating that States enjoy a wide margin of appreciation when it comes to matters of national security. Importantly, it stressed that ports and border controls will inevitably provide a crucial focal point for detecting and preventing the movement of terrorists and/or foiling terrorist attacks.

Thirdly, and crucially, it found that the safeguards provided by domestic law at the time the applicant was stopped were insufficient to curtail the Schedule 7 powers so as to offer her adequate protection against arbitrary interference with her right to respect for her private life. It highlighted the very broad discretion afforded to the authorities in deciding if and when to exercise the powers (see above for the manner in which the applicant was stopped). It is of some significance that the Court did not consider that the absence of a requirement of reasonable suspicion that a person was in some way involved in terrorism by itself rendered the exercise of the powers in the applicant's case unlawful within the meaning of Article 8 § 2. It noted for example that guidance had been provided to examining officers which attempted to clarify when they could exercise their discretion to stop particular individuals. Nevertheless, the Court found that, at the time the applicant was stopped, the Schedule 7 scheme could not be considered Convention-compliant for the following reasons:

(i) persons could be examined for up to a maximum of nine hours and were compelled to answer questions put to them without the right to have a lawyer present;

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135. *Gillan and Quinton v. the United Kingdom*, no. 4158/05, § 64, ECHR 2010 (extracts).

(ii) the absence of any obligation on the part of the examining officer to show "reasonable suspicion" would appear to have made it difficult for persons to have the lawfulness of the decision to exercise the Schedule 7 power judicially reviewed;

(iii) although the use of the powers was subject to independent oversight by the Independent Reviewer of Terrorism Legislation, it did not appear to the Court that such oversight was capable of compensating for the otherwise insufficient safeguards applicable to the operation of the Schedule 7 regime.

In *Altay v. Turkey (no. 2)*[136] the Court ruled that oral communication between a lawyer and his or her client is a matter which falls within the notion of "private life".

The applicant was serving a life sentence. Since September 2005 he had had to conduct his consultations with his lawyer in the presence of a prison officer. The measure was imposed by a court when it was discovered that the lawyer had acted in a manner incompatible with the standards of her profession by trying to send the applicant reading material which did not relate to his defence rights. In the Convention proceedings the applicant alleged that the restriction of the privacy of his consultations with his lawyer was incompatible with his rights under Article 8. The Court agreed.

The judgment is noteworthy in that the Court ruled for the first time that an individual's oral communications with his or her lawyer in the context of legal assistance falls within the scope of private life since the purpose of such interaction is to allow that individual to make informed decisions about his or her life. Significantly, it observed in this connection (paragraph 49):

> ... More often than not the information communicated to the lawyer involves intimate and personal matters or sensitive issues. It therefore follows that whether it be in the context of assistance for civil or criminal litigation or in the context of seeking general legal advice, individuals who consult a lawyer can reasonably expect that their communication is private and confidential.

The Court had regard to its earlier case-law under Article 8, in particular regarding the privileged nature of the lawyer-client relationship in the context of correspondence between a prisoner and

136. *Altay v. Turkey (no. 2)*, no. 11236/09, 9 April 2019. See also under Article 6 § 1 (Right to a fair hearing in civil proceedings – Applicability) above.

his lawyer. It will be recalled that in its judgment in *Campbell v. the United Kingdom*[137], the Court saw no reason to distinguish between the different categories of correspondence with lawyers. It observed that, whatever their purpose, they concerned matters of a private and confidential character. Importantly, in the instant case (paragraph 51) the Court observed that

> this principle applies *a fortiori* to oral, face-to-face communication with a lawyer. It therefore follows that in principle oral communication as well as correspondence between a lawyer and his or her client is privileged under Article 8 of the Convention.

Although the right to confidential communications with a lawyer is not absolute, any interference with that right has to be justified in accordance with the requirements of the second paragraph of Article 8. In the applicant's case the Court found that the impugned restriction failed to satisfy the "in accordance with the law" test. It noted that the domestic court had imposed the restriction in response to the lawyer's attempt to send reading material to the applicant that was not related to the rights of the defence. However, the interception of correspondence solely because it did not relate to the rights of the defence was not provided for in the law relied on by the domestic court as a ground for restricting the confidentiality of consultations with a lawyer. For the Court, the manner of interpretation and application of the relevant law to the circumstances of the applicant's case was manifestly unreasonable and thus not foreseeable within the meaning of Article 8 § 2.

The protection of private life in the case of misidentification of a person shown in a photograph was examined for the first time in the decision in *Vučina v. Croatia*[138].

A lifestyle magazine with nationwide distribution published a photograph of the applicant attending a popular music concert. The caption to the picture wrongly identified the applicant as the wife of the then mayor of the city where the concert was taking place. The applicant brought a civil action against the publisher of the magazine, seeking damages in respect of the erroneous labelling of her photograph. She argued, *inter alia*, that, given the controversial public profile of the mayor, she had experienced a series of small but unpleasant incidents after the publication. The domestic courts ultimately dismissed her claim, stating that the facts of the case were not such as to warrant

137. *Campbell v. the United Kingdom*, 25 March 1992, § 46, Series A no. 233.

138. *Vučina v. Croatia* (dec.), no. 58955/13, 31 October 2019.

awarding pecuniary compensation. In particular, since the name of the mayor's wife had not been mentioned in a negative context, and since she was not perceived by the public as a controversial figure, the impugned error in the caption to the photograph did not amount to a breach of the applicant's personality rights.

The case is noteworthy in two respects.

(i) It is the first case where the alleged violation of the positive obligations arising under Article 8 of the Convention concerned the misidentification of a person shown in a photograph published, rather than from the publication of the picture itself (for a recent outline of the general principles concerning an individual's right to the protection of his or her image, see *López Ribalda and Others v. Spain*[139]).

(ii) In addition, the Court applied the threshold-of-seriousness test to the question of the applicability of Article 8 *ratione materiae* and, notably, to the question of the consequences for the applicant's privacy and honour/reputation, an approach set down in *Denisov v. Ukraine*[140] in the context of an employment dispute. The Chamber listed a series of factors by which to determine the effect on the present applicant: the manner in which the photograph was obtained; the nature of the publication; the purpose for which the photograph was used and how it could be used subsequently; and the consequences of publication of the photograph for the applicant (factors inspired by the case of *Couderc and Hachette Filipacchi Associés v. France*[141], cited in the draft decision).

Having applied these criteria, the Court concluded that, while the erroneous misidentification might have caused some distress to the applicant, the level of seriousness associated with the erroneous labelling of her photograph and the inconvenience that she had suffered did not give rise to an issue under Article 8, whether in the context of the protection of her image or her honour and reputation. Consequently, Article 8 did not apply to the facts of the case, and the application was found to be incompatible *ratione materiae* with the provisions of the Convention.

Family life

Strand Lobben and Others v. Norway[142] concerned shortcomings in the decision-making process that resulted in the adoption of a vulnerable child by foster parents.

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139. *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 89, 17 October 2019.

140. *Denisov v. Ukraine* [GC], no. 76639/11, § 92, 25 September 2018.

141. *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 86-87, ECHR 2015 (extracts).

142. *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019.

The applicants were a mother and her son. Four days after the son was born, both moved to a parent-child institution. Three weeks later the mother withdrew her agreement to stay in the institution and, as a result of serious concerns expressed by the institution as to her ability to provide basic care to her son, he was placed in foster care as an emergency measure. When making a full care order, the courts limited the mother's access to her son to six two-hour visits every year, which was subsequently reduced to four two-hour visits. Approximately three years later, and contrary to her wishes, the mother was deprived of her parental responsibility and the foster parents were authorised to adopt her son. The domestic courts found that particularly weighty reasons existed for consenting to the proposed adoption. While the mother's general situation had improved (she had married and had a baby daughter for whom she appeared to be able to care), she would not be sufficiently able to understand the special-care needs of her son, whom several experts had described as a vulnerable child who needed a lot of quiet, security and support, and adoption would give the son, who was attached to his foster parents, a sense of security.

The Grand Chamber found that there had been a violation of Article 8 of the Convention.

The Grand Chamber judgment is noteworthy for the manner in which the principles – developed in *Olsson v. Sweden (no. 1)*[143], *Johansen v. Norway*[144] and *K. and T. v. Finland*[145] – have been applied to the present case, in particular, the principles concerning the positive obligation to take measures to facilitate family reunification as soon as reasonably feasible, an obligation which weighs on the authorities with progressively increasing force from the beginning of the period of care, subject always to it being balanced against the duty to consider the best interests of the child.

The principal issue for the Grand Chamber was whether the decision-making process, leading to the withdrawal of parental responsibility and to adoption, had been conducted so as to ensure that all views and interests of the applicants were taken into account and whether it had been accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake. In finding fault with the decision-making process and thus a violation of Article 8 of the Convention, the Grand Chamber identified a number of shortcomings.

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143. *Olsson v. Sweden (no. 1)*, 24 March 1988, Series A no. 130.

144. *Johansen v. Norway*, 7 August 1996, *Reports of Judgments and Decisions* 1996-III.

145. *K. and T. v. Finland* [GC], no. 25702/94, ECHR 2001-VII.

In the first place, the Grand Chamber found that the domestic authorities did not perform a genuine balancing exercise between the interests of the child and those of his biological family, but rather focused on the child's interests without seriously contemplating any possibility of the child's reunification with his biological family. It was noted, for example, that contact sessions had been intended as a means of keeping the child familiar with his roots rather than facilitating his future return to the care of his biological mother. The manner in which those contact arrangements had been organised was found not to have been particularly conducive to allowing the applicants to bond freely with one another and, while the contact sessions had often not gone well, little was done to explore alternative arrangements.

Secondly, the assessment of the mother's caring skills, a factor of central importance for the domestic courts, was considered to have been flawed in a number of ways. The relevant expert reports, ordered during earlier stages of the proceedings, dated from two years previously when the impugned decision had been taken. Only one of those reports had actually been based on observations of the interplay between the applicants, and then on only two occasions. In any event, only limited evidence could be drawn from the sparse contact that had taken place between the applicants during the child's placement in foster care. In addition, the authorities had not considered the potential significance of the mother's new family situation (her marriage and the birth of her second child). The lack of a fresh expert examination in these circumstances had substantially limited the factual assessment of her caring skills at the material time.

Thirdly, the domestic courts' reasoning in respect of the child's special needs and vulnerability had been insufficient, having regard to the seriousness of the interests at stake. In particular, it had not been explained how the son's vulnerability still persisted despite the fact that he had lived in foster care since the age of three weeks. Moreover, there had been barely any analysis of the nature of his vulnerability, beyond a brief description by experts that he was easily stressed and needed a lot of quiet, security and support.

The judgment in *Guimon v. France*[146] concerned the refusal to allow a prisoner convicted of terrorist offences to leave prison under escort in order to pay her respects to her recently deceased father.

146. *Guimon v. France*, no. 48798/14, 11 April 2019.

The applicant, a member of the terrorist organisation ETA, had been in detention for eleven years for serious terrorist offences when she requested escorted leave in order to travel to a funeral home to pay her respects to her recently deceased father. She had not seen him for five years, since he had not been able to visit her in prison due to his ill health and the fact that the prison was very far away. The applicant had submitted her request for prison leave promptly, leaving the authorities six days in which to organise an escort. Her request was refused for logistical reasons, as were all her appeals.

The case is interesting in that it adds to and clarifies the case-law concerning prison leave under escort in order to attend funerals (*Płoski v. Poland*[147]; *Kubiak v. Poland*[148]; and *Kanalas v. Romania*[149]), transposing the relevant principles of the proportionality analysis to the terrorism context.

The Court concluded that there had been no violation of Article 8.

It noted that, according to the judicial authorities, the escort arrangements needed to be particularly robust, given the applicant's criminal profile (she was serving several prison sentences for acts of terrorism and continued to assert her membership of ETA); the context in which the leave would have to be organised (returning a convicted Basque activist to the Basque Country, where she had much support); and factual considerations such as the geographical distance of almost 650 km.

The Court saw no reason to question the Government's assertion that the time available had been insufficient to arrange an escort comprising officers specially trained in the transfer and supervision of a prisoner convicted of terrorist offences and to organise the prior inspection of the premises. The refusal had not, therefore, been disproportionate to the legitimate aims pursued, which were to prevent the risks of escape and disturbance of public order, to ensure public safety, and to prevent disorder and crime.

Prohibition of discrimination (Article 14)

Article 14 taken in conjunction with Article 1 of Protocol No. 1

The judgment in *J.D. and A v. the United Kingdom*[150] concerned the test to be applied as regards the justification for a measure of social

147. *Płoski v. Poland,* no. 26761/95, 12 November 2002.

148. *Kubiak v. Poland*, no. 2900/11, 21 April 2015.

149. *Kanalas v. Romania*, no. 20323/14, 6 December 2016.

150. *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, 24 October 2019 (not final).

and economic policy ("very weighty reasons" or "manifestly without reasonable foundation").

The two applicants were social-housing tenants. Following a change to the statutory scheme in 2012, the housing benefit to which they were previously entitled to subsidise their rental costs was reduced because the amended scheme categorised the two applicants as having an extra bedroom. The purpose of the change was to save public funds by incentivising those with "extra" bedrooms in social housing to move to smaller homes.

They complained mainly under Article 14 in conjunction with Article 1 of Protocol No. 1 that these changes put them in a more precarious position than others affected by the reduction because of their personal circumstances which meant they had a particular need to remain in their homes: the first applicant cared for her disabled child full time, and the second was housed under a "sanctuary scheme" to protect those who had experienced and remained at risk of serious domestic violence.

The Chamber found no violation as regards the first applicant: while it would be disruptive and undesirable for her to move, the effect of the measure was proportionate in her case as she could move to smaller, appropriately adapted accommodation, and a discretionary housing benefit was available. The Chamber found a violation in the case of the second applicant: the aim of reducing the housing benefit (incentivising her to move to a smaller house) conflicted with the aim of the "sanctuary scheme" (to enable her to remain in her home for her own safety), no weighty reasons had been given to justify the prioritisation of one legitimate aim over the other and, given this conflict, the availability of the discretionary benefit would not render the scheme proportionate.

The judgment is noteworthy for the Court's clarification of the appropriate test to be applied for the justification of a measure of social and economic policy in the context of Article 14 in conjunction with Article 1 of Protocol No. 1.

(i) This issue had been a key one before the domestic courts, which had disagreed on the test for justification to be applied in the present cases, in particular:

– whether it had to be shown that the measure was "manifestly without reasonable foundation", a test drawn from Article 1 of Protocol No. 1 and which test accorded a broad margin of appreciation to the State; or

– whether "weighty reasons" were required to justify the measure, a test drawn from Article 14 of the Convention and according less of a margin of appreciation to the State.

(ii) The Court noted that, while the margin of appreciation in the context of general measures of an economic or social policy was in principle wide, such measures had nevertheless to be implemented in a manner that did not violate the Convention prohibition of discrimination and had to comply with the requirement of proportionality. Consequently, even the wide margin in the sphere of economic or social policy would not justify laws or practices that would violate the prohibition of discrimination, so that the following tests would be applied:

– In the context of Article 14 in conjunction with Article 1 of Protocol No. 1, the Court confirmed that it had applied the "manifestly without reasonable foundation" test only to circumstances where an alleged difference in treatment resulted from a transitional measure designed to correct a historic inequality (see *Stec and Others v. the United Kingdom*[151]; *Runkee and White v. the United Kingdom*[152]; and *British Gurkha Welfare Society and Others v. the United Kingdom*[153]).

– Outside that context, and where the alleged discrimination was on the basis of disability and gender, "very weighty reasons" would be required to justify the impugned measure in respect of the applicants. The Court explained that, given the need to prevent discrimination against people with disabilities and foster their full participation and integration in society, the margin of appreciation enjoyed by the States in establishing different legal treatment for people with disabilities was considerably reduced and, because of the particular vulnerability of persons with disabilities, such treatment would require "very weighty reasons" to be justified (*Guberina v. Croatia*[154]). In addition, the advancement of gender equality being a major goal in the member States of the Council of Europe, "very weighty reasons" would have to be put forward before a difference in treatment based on gender could be regarded as compatible with the Convention (*Konstantin Markin v. Russia*[155]). It is worth noting that this test was expressed in terms of the facts of the present case (alleged discrimination on grounds of disability and gender) although the judgment did not expressly limit the application of the test thereto.

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151. *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, §§ 61-66, ECHR 2006-VI.

152. *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, §§ 40-41, 10 May 2007.

153. *British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, § 81, 15 September 2016.

154. *Guberina v. Croatia*, no. 23682/13, § 73, 22 March 2016.

155. *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012 (extracts).

ADVISORY OPINIONS (ARTICLE 1 OF PROTOCOL No. 16[156])

In response to the first request for an advisory opinion under Protocol No. 16 to the Convention, from the French Court of Cassation, the Court delivered its opinion in April 2019[157]. The issue under consideration was the private life of a child born of surrogacy abroad and the recognition of the legal relationship between that child and the intended mother who has no genetic link to the child.

The judgment in *Mennesson v. France*[158] concerned applicant children born in the United States of America through a legal gestational surrogacy arrangement. Their biological father and intended mother, who were married, were unable to obtain recognition in France of the parent-child relationship. The Court found that, having regard to the consequences of this serious restriction on the identity and right to respect for the private life of the children, the prevention of both the recognition and establishment under domestic law of their legal relationship with their biological father meant that the State had exceeded its margin of appreciation. It found a violation of the children's right to respect for their private life guaranteed by Article 8. In so concluding, the Court considered that a serious question arose as to the compatibility of this restriction with the children's best interests, an analysis which took on a special dimension where one of the intended parents was a biological parent, having regard to the importance of biological parentage as a component of identity. In the wake of that judgment, domestic law changed: registration of the details of the birth certificate of a child born through surrogacy abroad became possible for the intended father where he was the biological father, and where the intended mother was married to the biological father, it became possible to adopt the child. It was during the re-examination of the later appeal of the Mennessons that the Court of Cassation requested this Court to give an advisory opinion under Protocol No. 16 on two questions concerning the intended mother:

> 1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the

156. Protocol No. 16 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

157. *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother* [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

158. *Mennesson v. France*, no. 65192/11, ECHR 2014 (extracts).

> certificate designates the "intended mother" as the "legal mother", while accepting registration in so far as the certificate designates the "intended father", who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the "intended mother"?
>
> 2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?

(i) This was the first advisory opinion of the Court under Protocol No. 16 and the Court took the opportunity to define the boundaries of advisory-opinion requests and of the requests made in the present case. It confirmed that the Court had no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the domestic proceedings. Its role was limited to furnishing an opinion on the questions submitted and it was for the requesting court to draw, as appropriate, the conclusions which flow from the Court's opinion for the relevant provisions of national law and for the outcome of the case. Moreover, the opinion of the Court was to be confined to the issues directly connected to the pending domestic proceedings. Consequently, the Court clarified that the present request did not concern a surrogacy arrangement abroad using the eggs of the intended or surrogate mother, or the right to respect for family life of the children or of the intended parents, or the latter's right to respect for their private life.

In addition, the Court received several submissions, including from the Mennessons and their children, the French and other Governments, as well as from certain organisations. The Court made it clear that its role was not to reply to all the grounds and arguments submitted, or to set out in detail the basis for its response or to rule in adversarial proceedings on contentious applications by means of a binding judgment. Rather, its role was, within as short a time-frame as possible, "to provide the requesting court or tribunal with guidance enabling it to ensure respect for Convention rights when determining the case before it".

(ii) In responding to the questions of the Court of Cassation, the Court has developed its case-law under Article 8. The *Mennesson* line

of case-law[159] required domestic law to provide for a possibility of recognising the legal relationship between children born of surrogacy abroad and their intended and biological father. The present opinion extended that requirement to the intended mother who has no genetic link with the child, but to a more limited extent (emphasis added):

> [When] a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:
>
> 1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a *possibility of recognition of a legal parent-child relationship with the intended mother*, designated in the birth certificate legally established abroad as the "legal mother";
>
> 2. the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; *another means, such as adoption* of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented *promptly and effectively*, in accordance with the child's best interests.

Two factors were of key importance in reaching these conclusions. The best interests of the child being paramount, the impact of not recognising a parent-child relationship on the private life of the child was a key factor in the affirmative response to the first question and it also allowed the Court, in response to the second question, to require that any alternative means of recognition had to be prompt and effective. The scope of the margin of appreciation was also central, as was, consequently, the existence of any common ground between the laws of Contracting States. In this respect, and while the Court noted "a certain trend towards the possibility of legal recognition of the relationship between children conceived through surrogacy abroad and the intended parents, there [was] no consensus in Europe on this issue" and, where such recognition was possible, there was no consensus on the procedure used.

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159. *Labassee v. France*, no. 65941/11, 26 June 2014; *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14, 21 July 2016; and *Laborie v. France*, no. 44024/13, 19 January 2017.

While, as noted above, the Court confirmed that opinions under Protocol No. 16 are to be confined to the scenario raised by the requesting court, the present opinion may contain elements of broader application. In the first place, the Court noted that it had placed some emphasis in its case-law to date on the biological link with at least one intended parent and that that was the factual scenario before it: the Court went on to make clear that "it may be called upon in the future to further develop its case-law in this field, in particular in view of the evolution of the issue of surrogacy". In addition, the Court also confirmed that the necessity to provide the possibility of recognising a mother-child relationship would apply with even greater force where the child was conceived using the eggs of the intended mother. Finally, and although the couple in the scenario before the Court were married, the Court observed that adoption, invoked as another means of recognising a parent-child relationship, was only available under French law when the intended parents were married and that it was for the French courts to decide whether domestic adoption law would satisfy Convention requirements, taking into account the vulnerable position of the children concerned while adoption proceedings were pending.

JUST SATISFACTION (ARTICLE 41)

Georgia v. Russia (I)[160] concerned the award of just satisfaction in an inter-State case.

In its principal judgment[161] of 3 July 2014 in the above-mentioned case, the Court held that in the autumn of 2006 a coordinated policy of arresting, detaining and expelling Georgian nationals had been put in place in the Russian Federation which amounted to an administrative practice for the purposes of Convention case-law. It also held that there had been a violation of, *inter alia*, Article 4 of Protocol No. 4, Article 5 §§ 1 and 4 and Article 3 of the Convention, and Article 13 taken in conjunction with Article 5 § 1 and Article 3. The Court assumed in its judgment that "more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained or expelled".

The question of the application of Article 41 was reserved. The instant judgment was adopted at the close of the Court's examination of the parties' written submissions on that question, notably on the number of Georgian nationals alleged by the applicant Government to be victims of the violations established. In the latter connection, and within the

160. *Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 31 January 2019.
161. *Georgia v. Russia (I)* [GC], no. 13255/07, ECHR 2014 (extracts).

framework of an adversarial procedure, the applicant Government submitted at the Court's request a detailed list of 1,795 alleged and identifiable victims, the accuracy of which was in turn challenged by the respondent Government.

The judgment is of interest given that this was the first time since the just-satisfaction judgment in *Cyprus v. Turkey*[162] that the Court had been required to examine the question of just satisfaction in an inter-State case. In *Cyprus v. Turkey*, the Court concluded that Article 41 did, as such, apply to inter-State cases, and then proceeded to set out three criteria for establishing whether awarding just satisfaction was justified in an inter-State case, namely: (i) the type of complaint made by the applicant Government, which had to concern the violation of basic human rights of its nationals (or other victims); (ii) whether the victims could be identified; and (iii) the main purpose of bringing the proceedings.

Importantly, the Court confirmed in the instant case the conclusion reached in *Cyprus v. Turkey* (cited above) and found that the criteria triggering the applicability of Article 41 had been satisfied. The applicant Government were therefore entitled to submit a claim for just satisfaction. The key issue for the Court was to determine – in view of the information submitted by the applicant Government on alleged victims and the respondent Government's objections to its reliability – the "sufficiently precise and objectively identifiable" group of people which it would use as the basis for the purposes of making an award of just satisfaction. Significantly, the Court rejected the applicant Government's argument that it should take the figure referred to in paragraph 135 of the principal judgment as a basis to award just satisfaction. It noted among other matters (paragraph 52):

> The wording used by the Court in its reasoning in paragraph 135 of the principal judgment ... is cautious: ... In the second sentence of that paragraph the Court confines itself to indicating that it "therefore assumes" (in French: "*part donc du principe*") that more than 4,600 expulsion orders were issued against Georgian nationals, of whom approximately 2,380 were detained and forcibly expelled. It thus bases itself on an approximate number of expulsion and detention orders when examining whether there was an administrative practice, which is very different from establishing the identity of individual victims.

Contrasting the situation which obtained in *Cyprus v. Turkey*[163] (multiple violations of the Convention following a military operation by

162. *Cyprus v. Turkey* (just satisfaction) [GC], no. 25781/94, §§ 43-45, ECHR 2014.
163. *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.

the respondent Government), the Court observed that in the instant case the finding of the existence of an administrative practice contrary to the Convention was based on *individual expulsion decisions*, which meant that the parties must be in a position to identify the Georgian nationals concerned and to furnish it with the relevant information. It had initiated an adversarial procedure to that end, underpinned by the duty of both parties to cooperate with the Court (see, in this connection, Article 38 of the Convention and Rule 44A of the Rules of Court). The outcome of that procedure was the submission by the applicant Government of a list of 1,795 individual victims and the filing by the respondent Government of their response. The Court's treatment of the information supplied by the parties was noteworthy for the following reasons.

In the first place, it rejected the respondent Government's submission that the Court itself should identify each of the individual victims of the violations found by it in adversarial proceedings. It observed in this connection with reference to its established case-law "that it is not a court of first instance; it does not have the capacity, nor is it appropriate to its function as an international court, to adjudicate on large numbers of cases which require the finding of specific facts or the calculation of monetary compensation – both of which should, as a matter of principle and effective practice, be the domain of domestic jurisdictions". Importantly, it also added that this was particularly true of requests for just satisfaction submitted in an inter-State case.

Secondly, the Court carried out a preliminary examination of the list of 1,795 alleged victims submitted by the applicant Government, having regard to the comments in reply submitted by the respondent Government (the methodology adopted is described in paragraphs 68-72). In short, it proceeded on the assumption that the individuals named in the applicant Government's list could be considered victims of violations of the Convention and, given the circumstances of the case, the burden of proof rested with the respondent Government to rebut this. This preliminary examination ultimately enabled the Court to conclude that, for the purposes of awarding just satisfaction, it could use as a basis a "sufficiently precise and objectively identifiable" group of at least 1,500 Georgian nationals who were victims of a violation of Article 4 of Protocol No. 4, a certain number of whom were also victims of a violation of Article 5 § 1 and Article 3 of the Convention (see paragraph 70 for the Court's explanation for the exclusion of 290 persons from the list of victims).

Ruling on an equitable basis, the Court deemed it reasonable to award the applicant Government a lump sum of 10 million euros

in respect of non-pecuniary damage sustained by this group of at least 1,500 Georgian nationals, to be distributed to each of them in accordance with a number of criteria indicated in the judgment. The modalities of distribution and the obligations devolving on both parties are noteworthy. The Court considered (paragraph 79) that

> it must be left to the applicant Government to set up an effective mechanism for distributing the above-mentioned sums to the individual victims of the violations found in the principal judgment while having regard to the aforementioned indications given by the Court ..., and excluding the individuals who cannot be classified as victims according to the above-mentioned criteria ... This mechanism must be put in place under the supervision of the Committee of Ministers and in accordance with any practical arrangements determined by it in order to facilitate execution of the judgment. This distribution must be carried out within eighteen months from the date of the payment by the respondent Government or within any other period considered appropriate by the Committee of Ministers ...

BINDING FORCE AND EXECUTION OF JUDGMENTS (ARTICLE 46)

Execution of judgments

Tomov and Others v. Russia[164] concerned a structural problem relating to the inhuman conditions of transport of prisoners.

The applicant prisoners complained of the inhuman and degrading conditions in which they had been transported by road and rail and of the lack of effective means of redress for their complaints. Of relevance is the fact that the Court had already found in more than fifty judgments against the respondent State that it was in breach of Article 3 on account of prisoners' transport conditions (acute lack of space, inadequate sleeping arrangements, lengthy journeys, restricted access to sanitary facilities, faulty heating and ventilation, etc.). In many of these cases it also found a breach of Article 13 because of the absence of an effective remedy. Equally relevant was the fact that there were more than 680 prima facie meritorious cases pending before the Court in which the main or secondary complaint related to the alleged inhuman conditions of transport of prisoners, with the potential for many more such cases.

164. *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 3 (Inhuman or degrading treatment) above and Article 37 (Striking out) below.

In the instant case, the Court once again found that there had been a breach of Articles 3 and 13. It is noteworthy that the Court, with reference to the approach taken by the Grand Chamber when dealing with prison overcrowding in the case of *Muršić v. Croatia*[165], outlined the approach it would take in its consideration of transport-of-prisoners cases, thereby sending a signal to the respondent State on how to bring its domestic law into line with Article 3 standards.

It is significant that, on this occasion, and having regard to the respondent State's modest progress in the execution of its earlier judgments, the Court decided to engage with the respondent State on the urgent need for remedial action to deal with what it found to be a structural problem. Importantly, it noted in its reasoning under Article 46 of the Convention (paragraph 182) as follows:

> Taking into account the recurrent and persistent nature of the problem, the large number of people it has affected or is capable of affecting, and the urgent need to grant them speedy and appropriate redress at domestic level, the Court considers that repeating its findings in similar individual cases would not be the best way to achieve the Convention's purpose. It thus feels compelled to address the underlying structural problems in greater depth, to examine the source of those problems and to provide further assistance to the respondent State in finding appropriate solutions and to the Committee of Ministers in supervising the execution of the judgments ...

In line with its previous judgments on inhuman conditions of detention (see, for example, *Varga and Others v. Hungary*[166]; *Orchowski v. Poland*[167]; *Norbert Sikorski v. Poland*[168]; *Ananyev and Others v. Russia*[169]; and *Torreggiani and Others v. Italy*[170]), the Court outlined the measures that might help solve the structural problem it had identified, including the placement of prisoners as close to their home as possible (see *Polyakova and Others v. Russia*[171] on the placement of prisoners in remote facilities in Russia) and the replacement or refitting of prison vans and railway carriages in order to bring, for example, seating space into line

165. *Muršić v. Croatia* [GC], no. 7334/13, §§ 136-41, 20 October 2016.
166. *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, § 102, 10 March 2015.
167. *Orchowski v. Poland*, no. 17885/04, § 154, 22 October 2009.
168. *Norbert Sikorski v. Poland*, no. 17599/05, § 161, 22 October 2009.
169. *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, §§ 197-203 and 214-31, 10 January 2012.
170. *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, §§ 91-99, 8 January 2013.
171. *Polyakova and Others v. Russia*, nos. 35090/09 and 3 others, 7 March 2017.

with Article 3 requirements (see, under Article 3 above, the summary of the factors the Court considers to be incompatible with Article 3).

Importantly, the Court also stressed the need for preventive and compensatory remedies to be put in place that would allow all prisoners in the applicants' position to complain of their transport conditions. Significantly, the Court ruled that such remedies needed to take effect in the domestic legal system without undue delay, and not later than eighteen months after the judgment became final.

Marcello Viola v. Italy (no. 2)[172] concerned a life prisoner who was required to cooperate with the authorities in their fight against Mafia crime in order to obtain a review of his sentence and a possibility of release.

The Court indicated under Article 46 that Italy should provide for the possibility of introducing a review of the life sentence imposed on individuals sentenced under the same regime as the applicant. Such review should take account of the progress prisoners have made during their incarceration towards their rehabilitation. The domestic authorities should assess on that basis whether or not a particular prisoner has severed his or her links with the Mafia, rather than automatically equating a failure to cooperate with continuing dangerousness. Importantly, the Court stressed that Article 3 required a prospect of release but not a right to be released if the prisoner was deemed at the close of the review to still be a danger to society.

Infringement proceedings

In *Ilgar Mammadov v. Azerbaijan*[173] the Court examined for the first time an application in the context of infringement proceedings. In this procedure, which is provided for by Article 46 § 4, the Court determines whether a State has fulfilled its obligation under Article 46 § 1 to abide by a final judgment of the Court.

In 2014 the Court delivered its first judgment in *Ilgar Mammadov v. Azerbaijan*[174]. It found a violation of, *inter alia*, Article 18 in conjunction with Article 5, the Court considering that the purpose of the charges against Mr Mammadov and of his pre-trial detention had been to silence and punish him for his stance against the Government. He was

172. *Marcello Viola v. Italy (no. 2)*, no. 77633/16, 13 June 2019. See also under Article 3 (Inhuman or degrading punishment) above.

173. *Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019.

174. *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, 22 May 2014.

later convicted[175]. From the outset of the process of execution of the first *Ilgar Mammadov* judgment, the Committee of Ministers ("the CM") considered that the above-described violation cast doubt on the later criminal proceedings and called for Mr Mammadov's release. Since he was not released, on 5 December 2017 the CM referred a question to the Court under Article 46 § 4: whether the State had failed to abide by its obligations under Article 46 § 1 because Mr Mammadov had not been unconditionally released. Later, in August 2018, Mr Mammadov was released on probation for good behaviour by the court of appeal, having served two-thirds of his sentence. In March 2019 the Supreme Court deemed the terms of his probation to have been fulfilled and thus his sentence served in full.

The Grand Chamber has found that, having regard to these limited steps, the respondent State did not fulfil its obligation under Article 46 § 1 to abide by the first *Ilgar Mammadov* judgment.

(i) The question of the institutional balance between the Court and the CM has been central to many cases before the Court (for example, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)*[176], and *Burmych and Others v. Ukraine*[177]) and the Court's position is that a State's compliance with a judgment falls outside of its jurisdiction, unless it is raised in the infringement procedure for which Article 46 § 4 provides (*Moreira Ferreira v. Portugal (no. 2)*[178]). As this is the first time that the Court has had to examine a request under this infringement procedure, the first novel aspect of this case lies in how the Court frames its role under this provision.

In the first place, the Grand Chamber examined the extent to which it is to be guided by the findings of the CM in the prior execution process. It confirmed that the infringement proceedings were not intended to upset the fundamental balance between the CM and the Court. While the Court was required by Article 46 § 4 to make a *de novo* and definitive legal assessment of compliance, it acknowledged the value of the extensive *acquis* of the CM in carrying out its tasks under Article 46 § 2 and concluded that in infringement proceedings it would "take into consideration all aspects of the procedure" before the CM including the measures indicated by it and the CM's conclusions in the supervision

175. Proceedings later found to violate Article 6 in *Ilgar Mammadov v. Azerbaijan (no. 2)*, no. 919/15, 16 November 2017.

176. *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], no. 32772/02, ECHR 2009.

177. *Burmych and Others v. Ukraine* (striking out) [GC], nos. 46852/13 et al., 12 October 2017 (extracts).

178. *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 102, 11 July 2017.

process. Secondly, an important question arose as to the point in time at which the Court should consider whether infringement had occurred: it was found to be the date on which the CM referred the question under Article 46 § 4 because the execution procedure was a process and it was on that date the CM had considered that the State's actions were not "timely, adequate and sufficient".

(ii) The Court went on to outline and apply its existing case-law as regards the content of the obligations to implement a judgment contained in Article 46 § 1. In particular, the Court reaffirmed the obligation on the State to make restitution to the individual provided it is not "materially impossible" and does not "involve a burden out of all proportion to the benefit deriving from restitution instead of compensation". These principles are reflected in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts[179], in the practice of the CM, and in Rule 6 of the CM Rules for the supervision of the execution of judgments and of the terms of friendly settlements.

The relevant aspects of those principles concerning the need to make restitution were then applied to determine the key issue, namely the individual measures required to abide by the judgment finding a violation of Article 18 in conjunction with Article 5 in the first *Ilgar Mammadov* judgment. The Court observed that this violation had occurred because the authorities were driven by improper reasons, namely, to silence or punish Mr Mammadov. Consequently, and importantly, it considered that that violation of Article 18 in conjunction with Article 5 vitiated any later action resulting from the pursuit of the abusive criminal charges (his conviction and imprisonment). Accordingly, the Court found that to achieve restitution, the State had to eliminate the negative consequences of the abusive charges, including ensuring Mr Mammadov's release. Such restitution was considered achievable and, indeed, the State had not argued that restitution was "materially impossible" or involved "a burden out of all proportion to the benefit deriving from restitution instead of compensation". The finding that the violation of Article 18 in conjunction with Article 5 vitiated the later criminal proceedings is interesting in the light of the observations of the Court as regards the complaint under Article 18 in conjunction with Article 6 in *Ilgar Mammadov v. Azerbaijan (no. 2)*[180].

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179. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its 53rd Session (2001), UN Doc. A/56/10.

180. *Ilgar Mammadov (no. 2)*, cited above, §§ 260-62.

Finally, the Grand Chamber rejected the argument that any of the domestic proceedings, including those which eventually led to Mr Mammadov's unconditional release, constituted restitution. The domestic courts had rejected the findings of this Court in the first *Ilgar Mammadov* judgment and upheld his conviction based on the abusive charges. As such, they did not eliminate the negative consequences of the imposition of the abusive charges: Mr Mammadov had served his prison sentence and remained convicted on the basis of those charges. In any event, his release occurred after he had been detained for nearly four years and, importantly, after the CM had referred the case to the Court under Article 46 § 4, that latter date being the relevant one for the Court's examination. It concluded that the limited steps taken by the State did not permit it to find that the State Party had acted in "good faith", in a manner compatible with the "conclusions and spirit" of the first *Ilgar Mammadov* judgment, or in a way that would make practical and effective the protection of the Convention rights which the Court had found to have been violated.

Since the Court found that the State had failed to fulfil its obligation under Article 46 § 1, the judgment was final and would be referred back to the CM pursuant to Article 46 § 5 of the Convention.

OTHER CONVENTION PROVISIONS

Striking out (Article 37)

The decisions in *Taşdemir v. Turkey*[181], *Kutlu and Others v. Turkey*[182], and *Karaca v. Turkey*[183] concerned Article 2 and 3 cases in which unilateral declarations had been accepted with no undertaking to reopen the investigation, since there existed *de jure* or *de facto* obstacles to reopening.

The applicants alleged that their relatives had been unlawfully killed by State agents. In two of the applications (*Kutlu and Others* and *Karaca*), the accused had been acquitted on evidential and self-defence grounds, respectively. In *Taşdemir* the criminal proceedings had been discontinued at the appeal stage as time-barred.

In all three cases the Government submitted unilateral declarations acknowledging that there had been a breach of Article 2 and proposing compensation, but containing no undertaking to reopen or to continue

181. *Taşdemir v. Turkey* (dec.) (striking out), no. 52538/09, 12 March 2019.
182. *Kutlu and Others v. Turkey* (dec.), no. 18357/11, 12 March 2019.
183. *Karaca v. Turkey* (dec.), no. 5809/13, 12 March 2019.

the investigations. The Court struck the applications out of its list of cases on the basis of these declarations.

(i) The Court accepted that the obligation to investigate alleged ill-treatment by State agents subsists, even after a decision striking out, on the basis of a unilateral declaration, an applicant's substantive and procedural complaints under Articles 2 and 3 (*Tahsin Acar v. Turkey*[184]). Indeed, this is the case even if the State has not explicitly undertaken to continue/reopen the investigation in the terms of the unilateral declaration (*Jeronovičs v. Latvia*[185]).

The present decisions recognise an exception to that principle in that they accept that reopening an investigation cannot be required when there are *de jure* obstacles thereto. In *Karaca* a reopening obligation would be in conflict with the *ne bis in idem* principle (Article 4 of Protocol No. 7) since the village guards who had killed the applicant's son were known but had been acquitted on self-defence grounds and could not be put on trial a second time for the same offence. In *Taşdemir* the criminal proceedings against the police officers had been terminated on account of the expiry of the statute of limitations so that reopening the investigation despite that fact would be in conflict with the principle of legal certainty and the defendants' rights under Article 7 of the Convention.

Although not directly relevant to the present cases, the decisions also recognised that there may also be *de facto* obstacles to reopening or continuing an investigation. If a long time has passed since the incident, evidence might have disappeared, been destroyed or become untraceable and it might therefore in practice no longer be possible to reopen an investigation and conduct it in an effective fashion.

(ii) Having regard to the States' obligation to remove legal obstacles to providing adequate redress (*Maestri v. Italy*[186]), it is of significance that the Court stressed, as it did in *Jeronovičs,* that the unilateral-declaration procedure is not intended to allow a Government to escape their responsibility for breaches of the most fundamental rights contained in the Convention.

Importantly the Court indicated the sort of factors to which it would have regard in deciding whether, in the circumstances, it is *de jure* or *de facto* impossible to reopen an investigation, including:

– the nature and the seriousness of the alleged violation;
– the identity of the alleged perpetrator;

184. *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 84, ECHR 2004-III.
185. *Jeronovičs v. Latvia* [GC], no. 44898/10, §§ 117-18, 5 July 2016.
186. *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I.

– whether other persons not involved in the proceedings may have been implicated;

– the reason the criminal proceedings have been terminated;

– the shortcomings and any defects in the criminal proceedings preceding the decision to bring the criminal proceedings to an end; and

– whether the alleged perpetrator contributed to the shortcomings and defects that led to the criminal proceedings being brought to an end.

(iii) Finally, the decision in *Kutlu and Others* was quite specific. While the accused had been acquitted on evidential grounds, there remained the possibility of investigating the involvement of other persons in the killing. Following the amendment of the Code of Criminal Procedure in 2018, an applicant can ask the relevant prosecutor to reopen the investigations even where his application to this Court has been struck out on the basis of a unilateral declaration. Hence the Court could strike the application out of its list of cases as there appeared to be no obstacle to reopening the investigation.

In *Tomov and Others v. Russia*[187] the Court identified a structural problem relating to the inhuman conditions of transport of prisoners.

The Court rejected the Government's request to strike out three of the applications on the strength of unilateral declarations in which they acknowledged breaches of Articles 3 and 13 and proposed to pay compensation to the applicants concerned. Interestingly, the Court reasoned (paragraph 100) as follows:

> ... Acceptance of the Government's request to strike the present applications out of the Court's list would leave the current situation unchanged, without any guarantee that a genuine solution would be found in the near future ... Nor would it advance the fulfilment of the Court's task under Article 19, that is to "ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto" ...

187. *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, 9 April 2019. See also under Article 3 (Inhuman or degrading treatment) and Article 46 (Execution of judgments) above.

Chapter 3

Superior Courts Network

A unique pan-European network

In 2019 15 new members joined the Superior Courts Network (SCN) which now boasts 86 member courts from 39 Council of Europe member States (including four new States: Andorra, Iceland, Norway and the United Kingdom). The expansion of its membership has been accompanied by its functional development around an increasingly structured knowledge base.

Knowledge Sharing: a new platform for the benefit of its members

A highlight of 2019 was the roll-out to the SCN's members of a new Knowledge Sharing (KS) platform. As announced last year, this "gateway", originally set up for internal use, provides access to comprehensive and up-to-date knowledge on ECHR case-law[1]. The Court wished to share this platform with its national partners as soon as possible and this was achieved in June 2019.

The KS platform is designed as a dynamic tool, its content constantly evolving in line with the development of the Court's case-law. The aim for 2020 is to cover all substantive Articles of the Convention and the Protocols thereto, while continuing to develop in addition pages which cover Convention subjects concerning several Articles ("transversal themes").

In the meantime, the SCN members have begun exploring the potential of the KS platform and providing feedback to the Court, thereby assisting its further development. Opening the platform to SCN members will ensure access by these primary Convention actors to

1. See Annual Report 2018, Chapter 3.

up-to-date and contextualised Convention case-law knowledge, a key objective of the SCN.

The scaling-up of the platform should help to ensure that Convention law pervades all relevant areas of domestic law, this being the primary condition for the fulfilment of the subsidiarity principle, which underlies the *raison d'être* of the SCN.

Preparations for launching a fully external version of the KS platform are under way. The timing of that roll-out will depend on technical factors and available resources.

A tailored response to member courts' needs

Experience has shown that the member courts have varied needs in terms of access to the Court's case-law. These needs may cover both guidance in navigating the vast corpus of case-law and more fine-tuned technical assistance, to foster a better understanding of the Court's reasoning and methodology.

Consequently, going beyond the common knowledge base provided by the KS platform, in 2019 the Court's Registry continued to respond to various requests from SCN members. Questions were put to the Directorate of the Jurisconsult in the form of "formal requests" in reply to which the courts receive a structured list of case-law references. These lists are shared within the network as useful thematic sources.

Study visits to Strasbourg also took place, providing not only a unique opportunity for a better understanding of the functioning and role of the Court's key services but also for further case-law training and presentations. Finally, the Registry also organised online training in the use of research tools or on specific Convention themes.

Comparative-law studies for the benefit of all

The member courts continued to contribute actively to the Court's work on comparative law. These contributions, which are highly useful for the Court's comparative work, now constitute a valuable source for the whole Network. The member courts attach particular importance to exchanging informally, through the intermediary of the SCN, on the application of the Convention in each jurisdiction. Such contributions are therefore compiled and shared within the SCN, once the judgment (or decision), which was the subject of the comparative-law research, has been delivered.

A keynote event: the annual Forum

The 3rd Focal Point Forum of the SCN was held in Strasbourg in June with some 100 participants. It was marked by the launch of the KS platform and by thematic workshops on the Court's case-law. Other

highlights included presentations on the collective understanding and implementation of fundamental rights in Europe and the Court's first experience of Protocol No. 16[2]. Many representatives of the member courts also had an opportunity to meet with the judges of this Court.

The Forum's content is developed each year to encompass more legal themes and to make it more interactive. The desire expressed by member courts to reflect further and jointly on the application of the Strasbourg case-law at domestic level will certainly be taken into account on future occasions.

Sharing the responsibility for implementing the Convention

The SCN is a unique body in many ways: it is focused on the European Convention on Human Rights; its exchanges are of a technical, practical and non-judicial nature; it ensures extensive and up-to-date knowledge sharing; and its membership is extensive, giving it a broad and pan-European vocation.

As President Sicilianos has emphasised, it is extremely important for this Court to have continuous exchanges and dialogue with the superior courts and that is precisely what the SCN is achieving[3]. It is very often the judgments of the member courts which give rise to applications in Strasbourg. By providing direct access to Convention case-law knowledge and related expertise via the SCN, this Court provides a tangible means by which the superior courts can implement the Convention. The quality of these exchanges, as well as their interactive and multilateral nature, have made the SCN a valuable asset enabling all stakeholders to fulfil their respective roles in sharing their responsibility for implementing the Convention.

2. Protocol No. 16 to the Convention, which came into force on 1 August 2018 in respect of the States which had signed and ratified it, enables the highest national courts and tribunals of the States Parties to ask the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto.

3. See the interview with President Sicilianos at the SCN's Annual Forum in June 2019.

Chapter 4

Bringing the Convention home

Notable developments in 2019 included making the Knowledge Sharing platform available to members of the Superior Courts Network and the decision to begin preparing for a fully external version.

In line with the conclusions of the Interlaken, İzmir, Brighton, Brussels and Copenhagen Conferences, the Court's knowledge-sharing and case-law translation programmes are designed to improve the accessibility to and understanding of key Convention principles and standards at national level, in order to give full expression to the principle of subsidiarity, which will be inserted in the Preamble to the Convention when Protocol No. 15 comes into force.

The Court works with 86 superior courts in 39 member States as well as with multiple other partners who all share the objective of disseminating Convention standards with a view to improving their implementation at national level.

Notable developments in 2019 included the further consolidation of the Knowledge Sharing (KS) platform and making it available to members of the Superior Courts Network (see chapter 3). This first iteration of the KS platform was very well received and the Court now aims to make available a fully external version as soon as human and technical resources allow for it.

Pending that external platform, the Court's website contains a wealth of materials in multiple formats such as regularly updated case-law guides which cover an ever-expanding range of Convention Articles and transversal topics; a biannual overview of the most significant developments in the Court's case-law; thematic handbooks and factsheets; video-talks explaining its case-law in matters relating

to terrorism and asylum; as well as a methodological guide on how to make optimal use of the available materials.

With the help of its various partners the Court seeks to secure the translation of judgments, decisions and case-law publications into languages other than its official ones (English and French). 2019 saw a continued increase in the number of such translations.

DISSEMINATION OF THE COURT'S CASE-LAW

Selection of key cases

The Bureau of the Court identifies those judgments and decisions it considers to be of particular importance for each quarter, for example because they make a significant contribution to the development of the Court's case-law, deal with a new problem of general interest or entail a new interpretation or clarification of principles. Cases in this category will always be made available in both official languages. The selected cases can be found either by referring to the quarterly and annual lists available on the Court's website[1] or by selecting "Key cases" under the "Importance" filter in HUDOC.

The HUDOC case-law database

Since the extensive redesign of the database in 2012 the Registry has continued to add features to HUDOC (hudoc.echr.coe.int)[2]. The additions in 2019 included a document collection for advisory opinions adopted under Protocol 16. Improvements were also made to various search filters.

The HUDOC interface now exists in a total of six languages (English, French, Georgian, Russian, Spanish and Turkish) and a Ukrainian version will be launched in early 2020. The development of a Bulgarian interface is well under way and further language versions are under consideration.

The Registry continues to explore the feasibility of enabling users to filter results by machine-extracted factual concepts (thematic searches). Results thus far have not met expectations but the project is ongoing.

1. Under Case-law/Judgments and decisions/Selection of key cases/Key cases.
2. FAQs, manuals and video tutorials on HUDOC are available on the Court's website under Case-law/Judgments and decisions/HUDOC database.

Three new HUDOC sites were launched for other Council of Europe departments (FCNM, GRECO and GRETA), bringing the total number of HUDOC sites to eight.

The number of HUDOC visits increased by 14% in 2019 (4,516,395 visits compared with 3,955,016 visits in 2018).

Case-law translations programme

The Registry continued its efforts to improve the understanding of Convention principles and standards in those member States where neither of the Court's official languages is sufficiently understood. It should be noted that the 2015 Brussels Declaration called upon States Parties to promote accessibility to the Court's case-law by translating or summarising significant judgments as required, improved knowledge of the Convention being key to ensuring that the principle of subsidiarity is fully effective.

30,000
translations

31 languages

The Registry maintains a standing invitation to courts, ministries, judicial training centres, associations of legal professionals, non-governmental organisations and other partners to offer, for inclusion in HUDOC, any case-law translations to which they have the rights.

The Registry also references, on the Court's website, third-party websites or databases hosting translations of the Court's case-law, and welcomes suggestions for the inclusion of further sites of this kind[3].

The Court's various partners continue to support its work and the implementation of the Convention at national level by offering to translate select judgments, decisions and advisory opinions as well as publications, factsheets, legal summaries, country profiles and the like. These are then shared with the Court so as to be made available either on its website or in HUDOC. By way of example, some 50 translations of case-law guides, handbooks and research reports were published in 2019[4].

3. More information can be found on the Court's website under Case-law/Judgments and decisions/Case-law translations/Existing translations/External online collections of translations; scroll down to see the list of third-party sites.

4. Some 45 translations remained pending at the end of 2019 (for a complete list see the online table at www.echr.coe.int/Documents/Translations_pending_ENG.pdf). Publishers or anyone wishing to translate and/or reproduce Court materials (or any translation thereof) should

In addition, some 30,000 texts in 31 languages other than English and French have now been made available in HUDOC – nearly 20% of its total content – making it the first port of call for legal professionals across Europe and beyond[5]. The language-specific filter allows for rapid searching of these translations, including in free text.

By proposing or outsourcing materials for translation the Registry also lends its support to the implementation of Council of Europe Action Plans for specific member States as well as to the implementation of joint Council of Europe–European Union programmes and projects building capacity at national or regional level.

Finally, the Court continued to work with other sectors of the Council of Europe to accompany reforms, in particular in Morocco and Tunisia, as part of the Council of Europe's Neighbourhood Partnerships (2018-21), South Programme III (2018-2020) as well as in cooperation with the Council of Europe's programme Human Rights Education for Legal Professionals (HELP).

OTHER PUBLICATIONS AND INFORMATION TOOLS

Jurisconsult's *Overview of the case-law*

The Jurisconsult's *Overview of the case-law* provides valuable insight into the most important judgments and decisions delivered by the Court each year, setting out the salient aspects of the Court's findings and their relevance to the evolution of its case-law. The annual version of the *Overview* can be consulted in this Annual Report. Both the annual and interim versions (the latter is published halfway through the year) can also be downloaded separately from the Court's website.

Case-law guides and research reports

The Directorate of the Jurisconsult published four new case-law guides covering Articles 11 (freedom of assembly and association), 13 (right to an effective remedy) and 17 (prohibition of abuse of rights) of the Convention and Article 1 of Protocol No. 1 (protection of property). It continued to update regularly all the existing guides on both the admissibility criteria and substantive Convention rights. In addition, the Directorate launched a new series of thematic guides taking a transversal approach across the Convention. Each of these guides brings together all

contact publishing@echr.coe.int for further instructions regarding applicable intellectual rights and in order to avoid duplicating an already pending translation.

5. The translations are published with a disclaimer since the only authentic language version of a judgment, decision or advisory opinion is in one or both of the Court's official languages.

Convention Articles relevant to a particular theme. The first ones covered immigration and terrorism and further guides are planned for 2020.

The Directorate also published nine research reports on the Court's case-law covering the following subjects: the safety of journalists; the use of lethal force by State agents; the burden of proof in asylum cases; violence against women and access to justice; absence of a lawyer during the first days of custody; treatment of persons of unsound mind and lawfulness of detention; substantive law obstacles to access to a court; the notion of "complaint" and the principle *jura novit curia*; and the concept of a "safe third country".

All these materials are available online under Case-law/Case-law analysis.

Methodological guide

The Directorate also updated its methodological guide on how to make the best use of the HUDOC database, Court publications, newsfeeds and other tools (*Finding and understanding the case-law*). It is available in multiple languages on the Court's website (under Case-law/Case-law analysis).

Handbooks on European law

No new substantive Handbooks were published in 2019, but additional translations of existing ones were made available throughout the year. All Handbooks and language editions are available online under Case-law/Other publications.

Case-law Information Note

The Case-law Information Note (CLIN) has played a key role in the dissemination of the Court's case-law since the first monthly edition was published in 1998. It has evolved considerably over the years and now contains, in addition to a monthly round-up of legal summaries concerning interesting cases from this Court, summaries of cases from other European and international jurisdictions (courtesy of our partners in those courts), a news section, a recent-publications section and a monthly cumulative index.

The complete set of Information Notes and annual indexes are available on the Court's website (Case-law/Case-law analysis/Case-law Information Note), while individual legal summaries of the different cases can be found in the HUDOC database. These summaries are published on the day of delivery of the judgment, decision or opinion and are quickly translated into the other official language. Translations into non-official languages are also available in some cases.

Factsheets and country profiles

In 2019 the Press Unit prepared five new Factsheets on the Court's case-law concerning, in particular: health and expulsion (aliens); restrictions on the right to liberty and security for reasons other than those prescribed by the Convention; right to respect for family life of prisoners in remote penal facilities; use of force in the policing of demonstrations; and whistle-blowers. More than 60 Factsheets are now available in English and French, many of which have been translated into German, Greek, Italian, Polish, Romanian, Russian, Spanish and Turkish with the support of, among others, the States concerned and national human rights institutions. These Factsheets provide the reader with a rapid overview of the most relevant cases concerning a particular topic and are regularly updated to reflect the development of the case-law.

The Press Unit has also prepared Country Profiles covering each of the 47 Council of Europe member States. These profiles, which are updated regularly, provide general and statistical information on each State as well as summaries of the most noteworthy cases.

The Factsheets and Country Profiles can be viewed on, and downloaded from, the Court's website under Press/Press Service.

TRAINING OF LEGAL PROFESSIONALS

Judges and Registry members continued to offer their expertise at case-law training events both at the Court and in member States. The Court maintained its long-standing cooperation with the Court of Cassation and the *École nationale de la magistrature* in France. Cooperation continued with the Supreme Court of Russia and the Swedish National Courts Administration.

In partnership with the European Judicial Training Network the Court also organised training sessions for judges and prosecutors from EU member States.

In 2019 the Visitors' Unit organised 54 training sessions lasting between one and three days for legal professionals from 21 of the 47 member States.

15 HUDOC training sessions were organised for, among others, SCN member courts from Montenegro and the Slovak Republic, judges from the French Court of Cassation, as well as for judges and prosecutors being trained by the European Judicial Training Network.

The Registry continued to offer tailored video-conference presentations and question-and-answer sessions to Bar associations and judicial training centres. One notable event was the video-conference organised in cooperation with the Ukrainian National Legal Service

Training College (http://nsj.gov.ua), attended by several hundreds of judges located in numerous courts equipped with the necessary technology.

With the cooperation and support of the Council of Europe's HELP programme, the Court's website hosts three video-presentations in the *COURTalks-disCOURs* series: on the admissibility criteria, asylum and terrorism. These videos serve as a training tool for the HELP programme, judicial training institutes and Bar associations, complementing other materials produced by the Court and by HELP. The videos with their transcripts have been published online in multiple languages (Case-law/Case-law analysis/COURTalks-disCOURs).

GENERAL OUTREACH

Websites and social media

The focal point of the Court's communication policy is its websites, which, together with HUDOC-ECHR, recorded 7,038,953 visits in 2019 (an increase of 8.3% compared with 2018). The main website (www.echr.coe.int) provides a wide range of information on all aspects of the Court's work, including the latest news on its activities and cases; details of the Court's composition, organisation and procedure; Court publications and core Convention materials; statistical and other reports; and information for potential applicants and visitors.

In order to streamline the Court's external communication it was decided in late 2019 to consolidate the current two Twitter accounts (twitter.com/ECHR_Press and twitter.com/echrpublication) into a single account serving legal professionals, media outlets and the general public. The new account will be phased in as soon as feasible.

Lastly, the Court's website provides a gateway to the Court library web pages, which, though specialised in human rights law, also have materials on comparative law and public international law. The library's online catalogue, containing references to the secondary literature on the Convention case-law and Articles, was consulted 261,053 times in 2019.

Public relations

The year 2019 saw a number of events marking the Court's 60th anniversary. In January 2019 the President of the Court and the President of Finland, Sauli Niinistö, inaugurated in the Human Rights Building an exhibition entitled "Finland presents the 60th anniversary of the European Court of Human Rights". Held in connection with the Finnish Chairmanship of the Committee of Ministers of the Council of Europe,

the exhibition consisted of a series of panels illustrating the key developments in the Court's history, together with documents and information about Finland and the Court.

On 5 May 2019, the date of the Council of Europe's 70th anniversary, the Court welcomed members of the public for its open day. Over 3,000 people visited the Human Rights Building, learnt about the Court's work and had the opportunity to talk to the staff members present.

In June 2019 President Sicilianos and the French Secretary of State to the Minister for Europe and Foreign Affairs, Amélie de Montchalin, inaugurated at the Court the exhibition "France and the ECHR". Marking the Court's 60th anniversary, in connection with the French Chairmanship of the Committee of Ministers, this exhibition traced the history of relations between the Court and France, emphasising the major role played by a number of French figures in the drafting of the Convention and presenting certain landmark judgments against France, showing their impact at national level. The exhibition was also on display in Strasbourg and in Paris.

Also to mark the 60th anniversary, a number of postal services in Council of Europe member States issued special commemorative stamps, and the French illustrator Monsieur Z produced a poster of the Human Rights Building.

During the year the Court also hosted an exhibition, "One Trial – Four Languages", on the role of the interpreters during the Nuremberg Trial of 1945, at which simultaneous interpreting became an established technique. With the support of the German Ministry of Justice and Consumer Protection, a number of talks were held at the Court about aspects of the interpreting profession.

In addition, President Sicilianos, the Mayor of Strasbourg, Roland Ries, the Permanent Representative of Germany to the Council of Europe, Rolf Mafael, and the Permanent Representative of France to the Council of Europe, Jean-Baptiste Mattéi, took part in a ceremony to mark the 30th anniversary of the fall of the Berlin Wall, on 9 November 2019. They gave speeches in front of four panels from the Wall that were donated to the Council of Europe by Germany in 1990 and now stand on the forecourt of the Human Rights Building.

On the multimedia front, the film about the Court is now available in 40 languages on the Court's YouTube account. It explains how the Court functions, the challenges it faces and the extent of its activity, through examples of cases.

A new video has also been produced to inform applicants about the new non-contentious phase of the Court's procedure once an

application has been communicated. This video, which is available in French and English, can be found on the Applicants pages. The same part of the website has seen the addition of new documents and information that will help applicants to gain a better understanding of the main stages of proceedings before the Court.

16,141
visitors

410
information visits

54
training sessions

As to publications, the series of documents launched in 2017 to make the public aware of the Convention system in the various member States has been expanded by two further leaflets: "The ECHR and France: facts and figures", and "The ECHR and Georgia: facts and figures", both produced when those States respectively held or took over the Chairmanship of the Committee of Ministers.

The documents "Overview 1959-2018" and "The ECHR in facts and figures 2018" have been updated, with the aim of presenting the Court's statistics more generally.

Visits

In 2019 the Visitors' Unit organised 410 information visits for a total of 11,774 members of the legal community. In all, it welcomed a total of 16,141 visitors.

KEY CASES

List approved by the Bureau following recommendation by the Jurisconsult of the Court

Cases are listed alphabetically by respondent State. By default, all references are to Chamber judgments. Grand Chamber cases, whether judgments or decisions, are indicated by "[GC]". Decisions are indicated by "(dec.)". Chamber judgments that are not yet "final" within the meaning of Article 44 of the Convention are marked "(not final)".

AZERBAIJAN	*Ilgar Mammadov v. Azerbaijan* [GC], no. 15172/13, 29 May 2019
BELGIUM	*Rooman v. Belgium* [GC], no. 18052/11, 31 January 2019
	Romeo Castaño v. Belgium, no. 8351/17, 9 July 2019
CROATIA	*Ulemek v. Croatia*, no. 21613/16, 31 October 2019 (not final)

CYPRUS	*Güzelyurtlu and Others v. Cyprus and Turkey* [GC], no. 36925/07, 29 January 2019
FRANCE	*Advisory opinion requested by the French Court of Cassation*, request no. P16-2018-001, 10 April 2019
	Guimon v. France, no. 48798/14, 11 April 2019
	Khan v. France, no. 12267/16, 28 February 2019
HUNGARY	*Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019
ICELAND	*Sigurður Einarsson and Others v. Iceland*, no. 39757/15, 4 June 2019
ITALY	*Marcello Viola v. Italy (no. 2)*, no. 77633/16, 13 June 2019
MALTA	*Mifsud v. Malta*, no. 62257/15, 29 January 2019
NORWAY	*Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019
POLAND	*Olewnik-Cieplińska and Olewnik v. Poland*, no. 20147/15, 5 September 2019
PORTUGAL	*Fernandes de Oliveira v. Portugal* [GC], 78103/14, 31 January 2019
ROMANIA	*Mihalache v. Romania* [GC], no. 54012/10, 8 July 2019
	Nicolae Virgiliu Tănase v. Romania [GC], no. 41720/13, 25 June 2019
RUSSIA	*Georgia v. Russia (I)* (just satisfaction) [GC], no. 13255/07, 29 January 2019
	Z.A. and Others v. Russia [GC], nos. 61411/15 and 3 others, 21 November 2019
SPAIN	*López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, 17 October 2019
TURKEY	*Altay v. Turkey (no. 2)*, no. 11236/09, 9 April 2019
	Güzelyurtlu and Others v. Cyprus and Turkey [GC], no. 36925/07, 29 January 2019
	Karaca v. Turkey (dec.), no. 5809/13, 12 March 2019
	Kutlu and Others v. Turkey (dec.), no. 18357/11, 12 March 2019
	Taşdemir v. Turkey (dec.), no. 52538/09, 12 March 2019
UNITED KINGDOM	*Beghal v. the United Kingdom*, no. 4755/16, 28 February 2019
	J.D. and A v. the United Kingdom, nos. 32949/17 and 34614/17, 24 October 2019 (not final)

Chapter 5

Judicial activities

For more information go to www.echr.coe.int under Statistics.

59,800
pending applications

increase of 6%

328
judgments

delivered by Chambers

545
judgments

delivered by Committees of three judges

33,288
applications

declared inadmissible or struck out by single judges

11
judgments

delivered by the Grand Chamber

11
oral hearings

held by the Grand Chamber

5,002
applications

declared inadmissible or struck out by Committees

5
cases

relinquished to the Grand Chamber

8
cases

referred to the Grand Chamber

190
applications

declared inadmissible or struck out by Chambers

2
advisory-opinion requests

submitted to the Grand Chamber

1
advisory opinion

delivered by the Grand Chamber

COMPOSITION OF THE COURT

At 31 December 2019, in order of precedence, from left to right

LINOS-ALEXANDRE SICILIANOS, Greece President	ROBERT SPANO Iceland Vice-President	JON FRIDRIK KJØLBRO Denmark Vice-President
KSENIJA TURKOVIĆ Croatie Section President	PAUL LEMMENS Belgium Section President	SÍOFRA O'LEARY Ireland Section President
GANNA YUDKIVSKA Ukraine	PAULO PINTO DE ALBUQUERQUE Portugal	HELEN KELLER Switzerland
ANDRÉ POTOCKI France	ALEŠ PEJCHAL Czech Republic	KRZYSZTOF WOJTYCZEK Poland
VALERIU GRIȚCO Republic of Moldova	FARIS VEHABOVIĆ Bosnia and Herzegovina	DMITRY DEDOV Russian Federation
EGIDIJUS KŪRIS Lithuania	IULIA ANTOANELLA MOTOC Romania	BRANKO LUBARDA Serbia
YONKO GROZEV Bulgaria	CARLO RANZONI Liechtenstein	MĀRTIŅŠ MITS Latvia
ARMEN HARUTYUNYAN Armenia	STÉPHANIE MOUROU-VIKSTRÖM Monaco	GEORGES RAVARANI Luxembourg
GABRIELE KUCSKO-STADLMAYER Austria	PERE PASTOR VILANOVA Andorra	ALENA POLÁČKOVÁ Slovak Republic
PAULIINE KOSKELO Finland	GEORGIOS SERGHIDES Cyprus	MARKO BOŠNJAK Slovenia
TIM EICKE United Kingdom	LƏTIF HÜSEYNOV Azerbaijan	JOVAN ILIEVSKI North Macedonia
JOLIEN SCHUKKING Netherlands	PÉTER PACZOLAY Hungary	LADO CHANTURIA Georgia
MARÍA ELÓSEGUI Spain	IVANA JELIĆ Montenegro	GILBERTO FELICI San Marino
ARNFINN BÅRDSEN Norway	DARIAN PAVLI Albania	ERIK WENNERSTRÖM Sweden
RAFFAELE SABATO Italy	SAADET YÜKSEL Turkey	LORRAINE SCHEMBRI ORLAND Malta
ANJA SEIBERT-FOHR Germany	PEETER ROOSMA Estonia	
RODERICK LIDDELL United Kingdom Registrar	MARIALENA TSIRLI Greece Deputy Registrar	

COMPOSITION OF THE SECTIONS

At 31 December 2019, in order of precedence

section 1

KSENIJA TURKOVIĆ President
KRZYSZTOF WOJTYCZEK Vice-President
LINOS-ALEXANDRE SICILIANOS
ALEŠ PEJCHAL
ARMEN HARUTYUNYAN
PERE PASTOR VILANOVA
PAULIINE KOSKELO
TIM EICKE
JOVAN ILIEVSKI
RAFFAELE SABATO
ABEL CAMPOS Registrar
RENATA DEGENER Deputy Registrar

section 2

ROBERT SPANO President
MARKO BOŠNJAK Vice-President
VALERIU GRIȚCO
EGIDIUS KŪRIS
IVANA JELIĆ
ARNFINN BÅRDSEN
DARIAN PAVLI
SAADET YÜKSEL
PEETER ROOSMA
STANLEY NAISMITH Registrar
HASAN BAKIRCI Deputy Registrar

section 3

PAUL LEMMENS President
GEORGIOS A. SERGHIDES Vice-President
PAULO PINTO DE ALBUQUERQUE
HELEN KELLER
DMITRY DEDOV
ALENA POLÁČKOVÁ
MARÍA ELÓSEGUI
GILBERTO FELICI
ERIK WENNERSTRÖM
LORRAINE SCHEMBRI ORLAND
STEPHEN PHILLIPS Registrar

section 4

JON FRIDRIK KJØLBRO President
FARIS VEHABOVIĆ Vice-President*
IULIA ANTOANELLA MOTOC
BRANKO LUBARDA
CARLO RANZONI
STÉPHANIE MOUROU-VIKSTRÖM
GEORGES RAVARANI
JOLIEN SCHUKKING
PÉTER PACZOLAY
MARIALENA TSIRLI Registrar
ANDREA TAMIETTI Deputy Registrar

section 5

SÍOFRA O'LEARY President
GABRIELE KUCSKO-STADLMAYER
Vice-President
GANNA YUDKIVSKA
ANDRÉ POTOCKI
YONKO GROZEV
MĀRTIŅŠ MITS
LƏTIF HÜSEYNOV
LADO CHANTURIA
ANJA SEIBERT-FOHR
CLAUDIA WESTERDIEK Registrar
MILAN BLASKO Deputy Registrar

THE PLENARY COURT 22 May 2019, from left to right

FRONT ROW

Paul Lemmens, Paulo Pinto de Albuquerque, Ganna Yudkivska, Ksenija Turković, Vincent A. De Gaetano, Angelika Nußberger, Guido Raimondi, Linos-Alexandre Sicilianos, Robert Spano, Jon Fridrik Kjølbro, Işıl Karakaş, Julia Laffranque, Helen Keller, André Potocki

MIDDLE ROW

Roderick Liddell, Darian Pavli, María Elósegui, Egidijus Kūris, Dmitry Dedov, Armen Harutyunyan, Pauliine Koskelo, Stéphanie Mourou-Vikström, Valeriu Griţco, Jolien Schukking, Faris Vehabović, Síofra O'Leary, Gabriele Kucsko-Stadlmayer, Mārtiņš Mits, Gilberto Felici, Lətif Hüseynov, Yonko Grozev, Arnfinn Bårdsen

BACK ROW

Marko Bošnjak, Raffaele Sabato, Krzysztof Wojtyczek, Ivana Jelić, Carlo Ranzoni, Alena Poláčková, Jovan Ilievski, Branko Lubarda, Péter Paczolay, Georgios A. Serghides, Erik Wennerström, Tim Eicke, Lado Chanturia, Aleš Pejchal, Iulia Antoanella Motoc, Pere Pastor Vilanova, Georges Ravarani

Chapter 6

Procedural innovations

NON-CONTENTIOUS PHASE

The Court introduced a new practice as a test from 1 January 2019 involving a dedicated, non-contentious phase in respect of all Contracting States. The Court decided to test this practice for another year in 2020, at the end of which time it will decide whether to continue using this practice.

Purpose

- Facilitate the conclusion of friendly settlements
- Free up time for important meritorious cases
- Ease the workload of the Court

Expected outcome

- Procedural economy
- Reduction of the Court's backlog
- Timely response to applications
- Resources freed for other cases

Essential aspects

- The Court's Registry will make a friendly-settlement proposal when respondent Governments are given notice of applications
- There are two distinct phases in the procedure: a 12-week friendly settlement phase (non-contentious), and a further 12-week observations phase (contentious with an exchange of observations)

In practice

Previously these two phases ran in parallel; Governments were given 16 weeks to submit their observations on the admissibility and merits of a case. Within the first eight weeks of that period they were also required to inform the Court whether they were prepared to conclude a friendly settlement.

Under the new practice, the Registry does not make a proposal for friendly settlement in each and every case: there are exceptions, for example cases raising novel issues which have never been examined by the Court or cases where for a specific reason it may be inappropriate to propose a friendly settlement.

The Court will continue its current practice of publishing information on the subject matter of the case on HUDOC when Governments are given notice of applications. The letters sent to the parties at this stage will be revised to explain the new practice.

IMMEDIATE SIMPLIFIED COMMUNICATION PROCEDURE (IMSI)

IMSI started in March 2016 with a test project for certain countries, to develop a new working method aiming to speed up the communication of Chamber applications. It was then decided to extend it to all the other countries in subsequent years when observations are requested.

Purpose

- To reduce the backlog of pending Chamber category IV cases
- To shorten communication reports
- To transfer the onus to the parties to present and establish the facts and provide the relevant arguments, switching to a more adversarial approach
- To provide timely responses to alleged human rights violations

Advantages

COURT – First reply to applicant given more quickly, addressing Governments' concerns about compliance with Brighton deadlines

Possibility of drawing Governments' attention more quickly to certain questions

Time saved that can be spent on cases already communicated

More adversarial approach allows a decision to be taken once all the information is available

GOVERNMENT – Quicker notification of applications which are *a priori* admissible and ability to seek information at national level earlier

More neutral approach in relation to the issues raised at this stage and published on Hudoc

Possibility of proposing a friendly settlement or unilateral declaration, thereby reducing the number of applications pending against the State

APPLICANT – Faster processing of applications, first replies received more quickly

THIRD PARTY – Knowledge of the legal question before the Court received in good time

Chapter 7

Statistics

A glossary of statistical terms (Understanding the Court's statistics) and further statistics are available on www.echr.coe.int under Statistics.

Allocated applications*	2019	2018	+/–
Total	**44,500**	43,100	3%

Communicated applications	2019	2018	+/–
Total	**6,442**	7,646	– 16%

Decided applications	2019	2018	+/–
Total	**40,667**	42,761	– 5%
by judgment delivered	**2,187**	2,739	– 20%
by decision (inadmissible/struck out)	**38,480**	40,022	– 4%

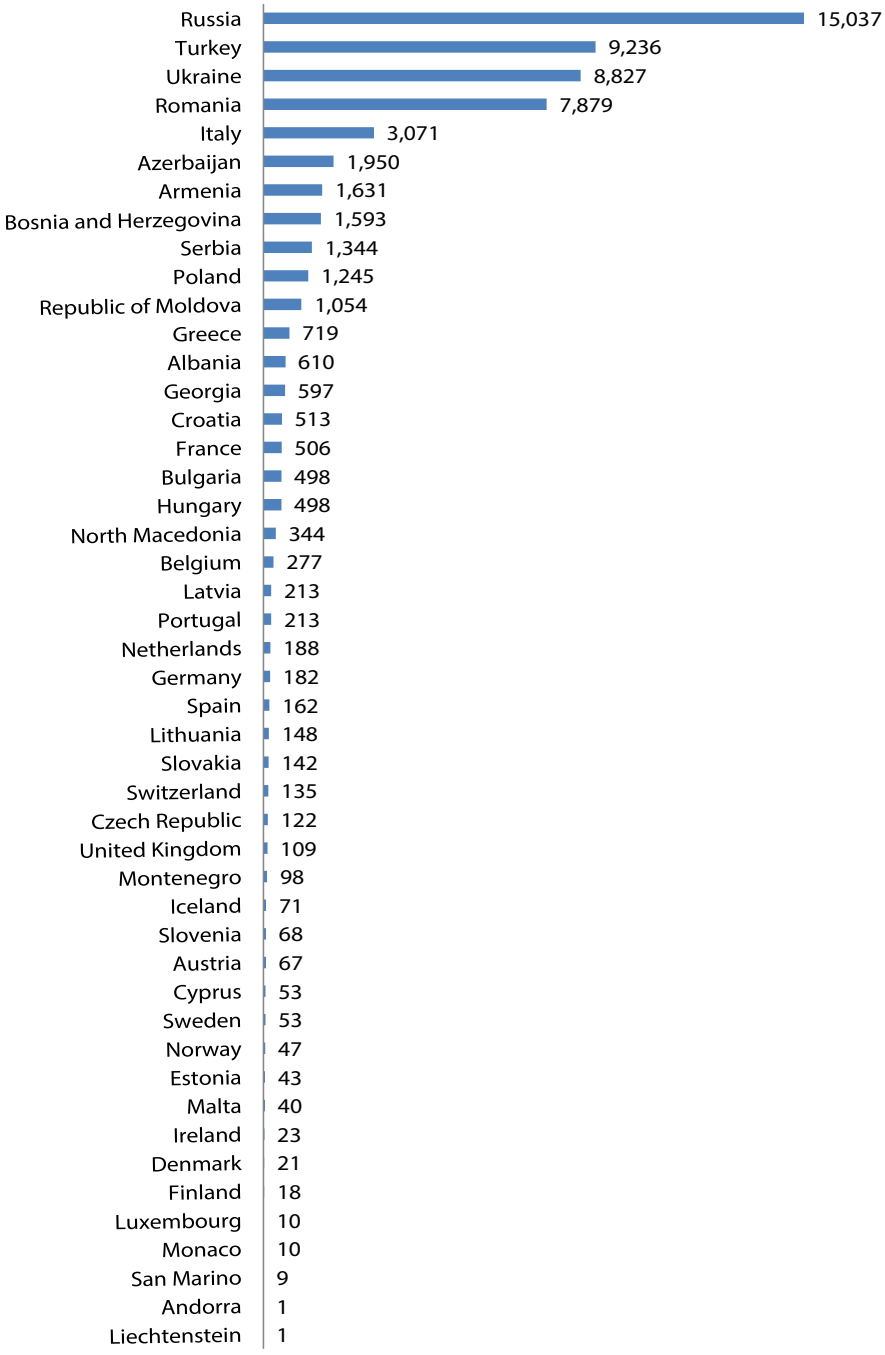
Pending applications*	31/12/19	01/01/19	+/–
Total	**59,800**	56,350	6%
Chamber and Grand Chamber	**20,050**	22,250	– 10%
Committee	**34,600**	29,350	18%
Single-judge formation	**5,150**	4,750	8%

Pre-judicial applications*	31/12/19	01/01/19	+/–
Total	**8,800**	9,750	– 10%

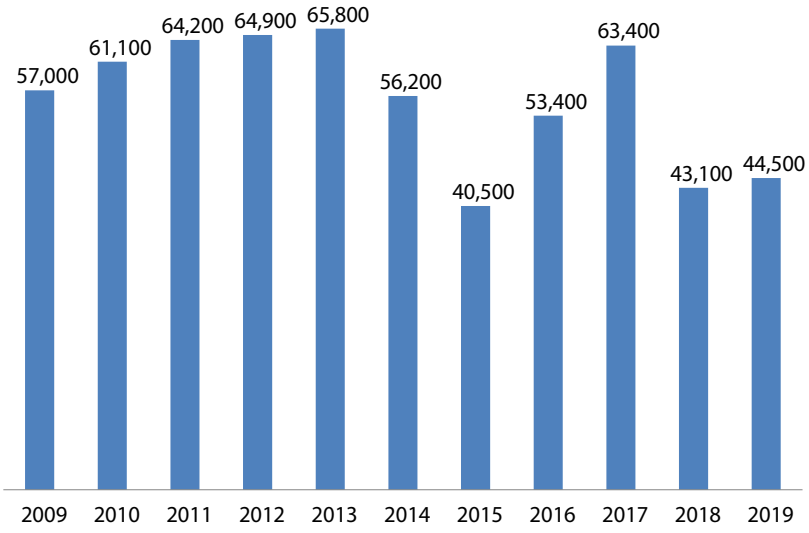
Applications disposed of administratively	2019	2018	+/–
Total	**20,400**	19,550	4%

* Round figures [50]

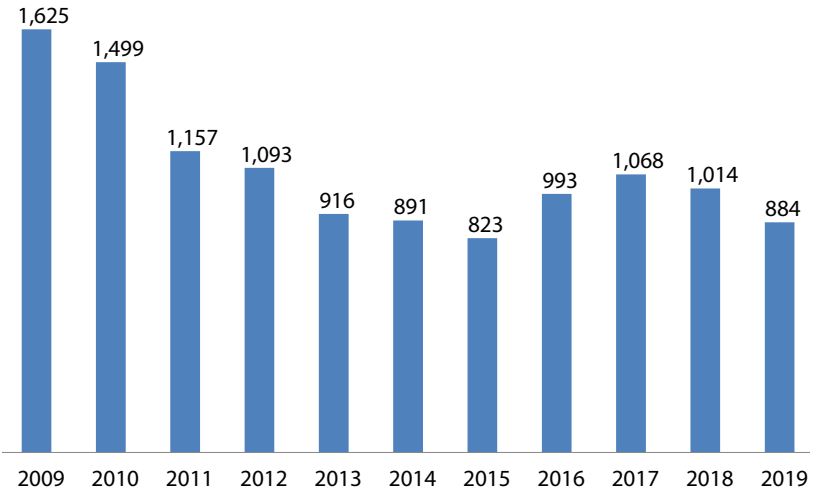
PENDING CASES (BY STATE)



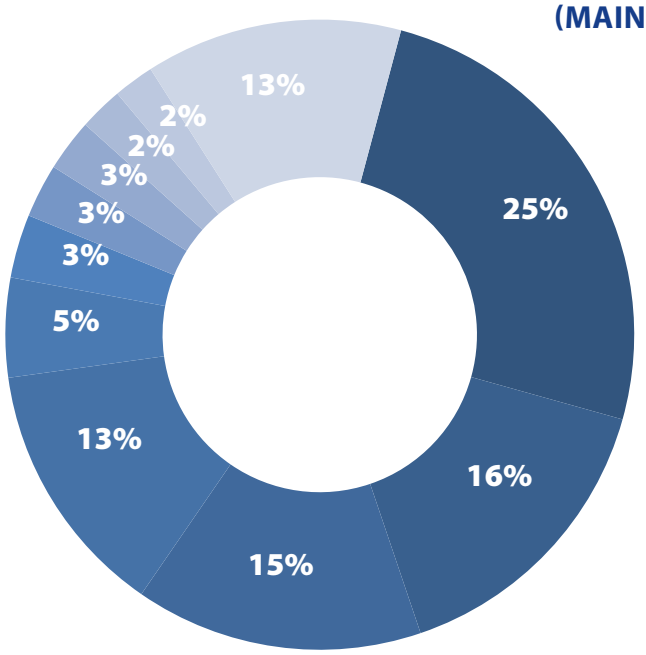
ALLOCATED APPLICATIONS (2009-19)



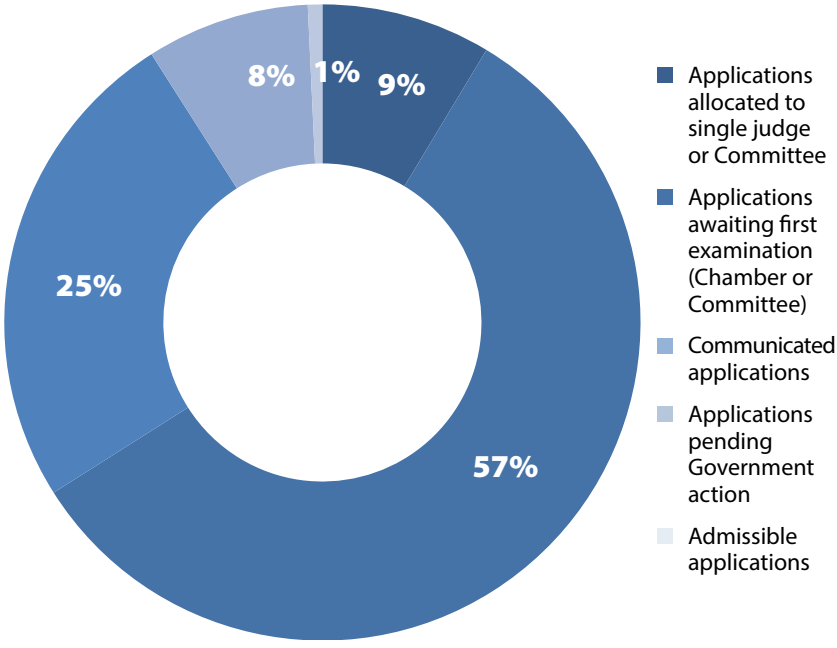
JUDGMENTS (2009-19)



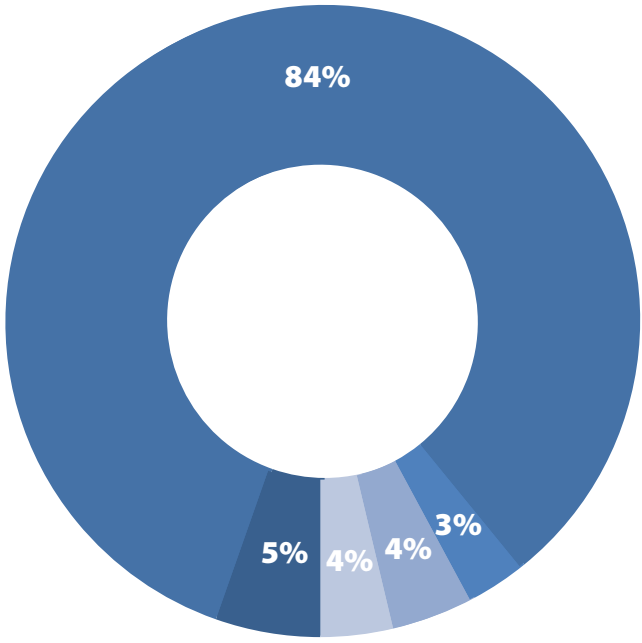
PENDING CASES (MAIN STATES)



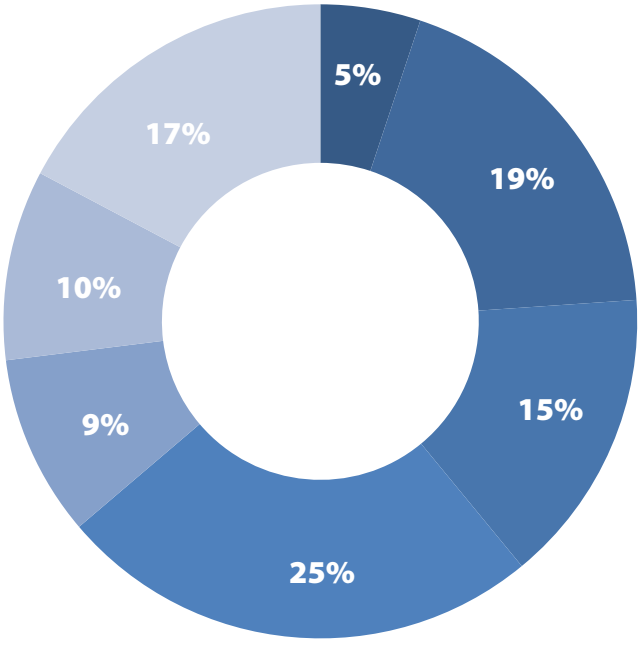
COURT'S WORKLOAD



DECIDED APPLICATIONS



VIOLATIONS BY SUBJECT MATTER



ALLOCATED APPLICATIONS BY STATE AND BY POPULATION (2016-19)

State	Applications allocated to a judicial formation				Population (1,000)				Allocated/population (10,000)			
	2016	2017	2018	2019	1.1.2016	1.1.2017	1.1.2018	1.1.2019	2016	2017	2018	2019
Albania	146	95	99	88	2,886	2,886	2,870	2,862	0.51	0.33	0.34	0.31
Andorra	4	2	3	6	72	73	75	76	0.56	0.27	0.40	0.79
Armenia	753	356	167	148	2,999	2,986	2,973	2,965	2.51	1.19	0.56	0.50
Austria	236	228	239	199	8,690	8,773	8,822	8,859	0.27	0.26	0.27	0.22
Azerbaijan	331	679	313	397	9,706	9,810	9,898	9,898	0.34	0.69	0.32	0.40
Belgium	184	153	177	139	11,311	11,366	11,399	11,468	0.16	0.13	0.16	0.12
Bosnia and Herzegovina	1,030	866	898	1,784	3,516	3,510	3,502	3,502	2.93	2.47	2.56	5.09
Bulgaria	882	582	774	750	7,154	7,102	7,050	7,000	1.23	0.82	1.10	1.07
Croatia	764	723	669	712	4,191	4,154	4,105	4,076	1.82	1.74	1.63	1.75
Cyprus	33	31	52	45	848	855	864	876	0.39	0.36	0.60	0.51
Czech Republic	338	385	349	300	10,554	10,579	10,610	10,650	0.32	0.36	0.33	0.28
Denmark	47	58	37	59	5,707	5,749	5,781	5,806	0.08	0.10	0.06	0.10
Estonia	206	156	132	121	1,316	1,316	1,319	1,325	1.57	1.19	1.00	0.91
Finland	196	181	174	131	5,487	5,503	5,513	5,518	0.36	0.33	0.32	0.24
France	916	887	871	693	66,760	67,024	66,926	67,028	0.14	0.13	0.13	0.10
Georgia	74	89	99	131	3,720	3,718	3,730	3,723	0.20	0.24	0.27	0.35
Germany	676	586	489	584	82,176	82,800	82,792	83,019	0.08	0.07	0.06	0.07
Greece	337	422	420	344	10,784	10,757	10,741	10,722	0.31	0.39	0.39	0.32
Hungary	5,568	1,952	902	950	9,830	9,798	9,778	9,773	5.66	1.99	0.92	0.97
Iceland	24	27	24	40	333	338	348	357	0.72	0.80	0.69	1.12
Ireland	26	54	30	37	4,725	4,775	4,830	4,904	0.06	0.11	0.06	0.08
Italy	1,409	1,374	1,692	1,454	60,666	60,589	60,484	60,360	0.23	0.23	0.28	0.24
Latvia	255	275	259	233	1,969	1,950	1,934	1,920	1.30	1.41	1.34	1.21
Liechtenstein	10	9	9	6	38	38	38	38	2.63	2.37	2.37	1.58

State	Applications allocated to a judicial formation				Population (1,000)				Allocated/population (10,000)			
	2016	2017	2018	2019	1.1.2016	1.1.2017	1.1.2018	1.1.2019	2016	2017	2018	2019
Lithuania	405	401	438	396	2,889	2,848	2,809	2,794	1.40	1.41	1.56	1.42
Luxembourg	38	38	35	23	576	591	602	614	0.66	0.64	0.58	0.37
Malta	25	22	30	35	434	440	476	494	0.58	0.50	0.63	0.71
Republic of Moldova	834	758	814	635	3,553	3,553	3,547	3,547	2.35	2.13	2.29	1.79
Monaco	6	7	5	8	38	38	38	38	1.58	1.84	1.32	2.11
Montenegro	165	138	318	427	622	622	622	622	2.65	2.22	5.11	6.86
Netherlands	494	532	429	400	16,979	17,082	17,181	17,282	0.29	0.31	0.25	0.23
North Macedonia	339	345	305	262	2,071	2,074	2,075	2,077	1.64	1.66	1.47	1.26
Norway	90	123	84	102	5,214	5,258	5,296	5,328	0.17	0.23	0.16	0.19
Poland	2,422	2,066	1,941	1,834	37,967	37,973	37,977	37,973	0.64	0.54	0.51	0.48
Portugal	152	197	149	188	10,341	10,310	10,291	10,277	0.15	0.19	0.14	0.18
Romania	8,192	6,509	3,369	2,656	19,760	19,638	19,531	19,402	4.15	3.31	1.72	1.37
Russia	5,587	7,957	12,148	12,782	143,667	143,667	143,667	143,667	0.39	0.55	0.85	0.89
San Marino	13	11	4	10	33	33	34	35	3.94	3.33	1.18	2.86
Serbia	1,330	1,431	2,128	2,160	7,076	7,040	7,001	6,964	1.88	2.03	3.04	3.10
Slovak Republic	309	425	390	300	5,426	5,435	5,443	5,450	0.57	0.78	0.72	0.55
Slovenia	239	374	274	210	2,064	2,066	2,067	2,081	1.16	1.81	1.33	1.01
Spain	627	669	592	606	46,440	46,529	46,659	46,935	0.14	0.14	0.13	0.13
Sweden	138	150	194	209	9,851	9,995	10,120	10,230	0.14	0.15	0.19	0.20
Switzerland	258	266	272	279	8,327	8,418	8,484	8,542	0.31	0.32	0.32	0.33
Turkey	8,303	25,978	6,717	7,274	78,741	79,815	80,810	82,004	1.05	3.25	0.83	0.89
Ukraine	8,644	4,387	3,207	3,991	45,246	45,246	45,246	45,246	1.91	0.97	0.71	0.88
United Kingdom	372	415	354	344	65,383	65,809	66,274	66,647	0.06	0.06	0.05	0.05
TOTAL	**53,427**	**63,369**	**43,075**	**44,482**	**828,136**	**830,929**	**832,632**	**834,974**	**0.65**	**0.76**	**0.52**	**0.53**

The Council of Europe member States had a combined population of approximately 835 million inhabitants on 1 January 2019. The average number of applications allocated per 10,000 inhabitants was 0.53 in 2019. Sources 2014 and 2019: Internet sites of United Nations Statistics Division and Eurostat service ("Population and social conditions").

VIOLATIONS BY ARTICLE AND BY STATE (2019)

	Total of judgments	At least one violation	No violation	Friendly settlements / striking-out	Other judgments [1]	Right to life	Lack of effective investigation	Prohibition of torture [2]	Inhuman / degrading treatment	Lack of effective investigation	Conditional violations [3]	Prohibition of slavery / forced labour	Right to liberty and security	Right to a fair trial [2]	Length of proceedings	Non-enforcement	No punishment without law	Respect for private and family life [2]	Freedom of thought, conscience, religion	Freedom of expression	Freedom of assembly and association	Right to an effective remedy	Prohibition of discrimination	Right to marry	Protection of property	Right to education	Right to free elections	Right not to be tried / punished twice	Other Articles of the Convention
							Art. 2	Art. 2	Art. 3	Art. 3	Art. 3	Art. 2/3	Art. 4	Art. 5	Art. 6	Art. 6	Art. 6	Art. 7	Art. 8	Art. 9	Art. 10	Art. 11	Art. 12	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4	
Albania	1	1						1			1																		
Andorra																													
Armenia	20	18	1		1	1									4	1			2	1		2		3		9				
Austria	6	4	1		1											2			2											
Azerbaijan	21	18			3	1	2		3	1				7	5		1		2	1	1	4				2		2		6
Belgium	8	6	2				1		2					2		1								1				1		
Bosnia and Herzegovina	21	21												1	3	2	13									15				1
Bulgaria	19	13	4		2							3			4				2		1			5		4				
Croatia	11	9	1		1				1					1	6			1	3							1				
Cyprus	2	1	1						1					1																
Czech Republic																														
Denmark	2	2										1		1																
Estonia	2	2							1										1					1						
Finland	2	1	1			1			1																					
France	19	13	6				1		2	1					7				1						1			1		
Georgia	14	13	1			1	1		4	4					7											1				
Germany	8		8																											
Greece	24	23	1				2		4	1			1	5	2	8								1	7		4	1			
Hungary	40	36	3		1				3	1				5		27			1		4				16		1			
Iceland	6	6													4													2		
Ireland	2	1	1													1									1					
Italy	14	13	1						1	1				1	2	3	1		3		1				2		4			
Latvia	4	4													2	1										1				
Liechtenstein																														

	Total of judgments	At least one violation	Friendly settlements / striking-out	No violation	Other judgments [1]	Right to life	Lack of effective investigation	Prohibition of torture [2]	Inhuman / degrading treatment	Lack of effective investigation	Conditional violations [3]	Prohibition of slavery / forced labour	Right to liberty and security	Right to a fair trial [2]	Length of proceedings	Non-enforcement	No punishment without law	Respect for private and family life [2]	Freedom of thought, conscience, religion	Freedom of expression	Freedom of assembly and association	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried / punished twice	Other Articles of the Convention
							Art. 2	Art. 2	Art. 3	Art. 3	Art. 3	Art. 2/3	Art. 4	Art. 5	Art. 6	Art. 6	Art. 6	Art. 7	Art. 8	Art. 9	Art. 10	Art. 11	Art. 12	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4	
Lithuania	19	10	6		3		2		5	2			1	1				1							1				
Luxembourg																													
Malta	12	9	3											1									3		8				
Republic of Moldova	54	39	14		1				5	1			9	22		5		4		1			3		15				
Monaco																													
Montenegro	3	2			1				1				3																
Netherlands	1	1												1															
North Macedonia	12	9			3									3	1			2							3				
Norway	5	4	1															4											
Poland	12	11	1				1	1		3	3			2	3					1									
Portugal	9	8			1			1		1				1	1			1		3									
Romania	62	56	5	1						30	1			2	4	5	2		4	1	1			3	6	1		1	1
Russian Federation	198	186	5		7		20	22	1	57	22	8		90	61	1	14		22		19	10	43	3	26			1	10
San Marino	4	1	3												1														
Serbia	24	22	1		1				3	3			1		10	7		1							5				
Slovak Republic	5	5											1	2				1							1				
Slovenia	5	4			1									1				1						1	1				
Spain	4	3	1											2				1											
Sweden																													
Switzerland	6	5	1									1		2	1			1											
Turkey	113	96	6	5	6		4	2		12	4			16	13	4		1	11		35	2	2		14	1			2
Ukraine	109	109						3	4	40	10			54	22	35	1		9	1	1	2	38	1	10				12
United Kingdom	5	5												1					2					1			1		
Sub-total		790	79	6	33		29	39	5	180	56	13	1	204	184	106	44	2	82	4	68	20	1	125	11	131	3	4	5	32
Total[4]		**884**																											

VIOLATIONS BY ARTICLE AND BY STATE (1959-2019)

	Total of judgments	At least one violation	No violation	Friendly settlements / striking-out	Other judgments [1]	Right to life	Lack of effective investigation	Prohibition of torture [2]	Inhuman / degrading treatment	Lack of effective investigation	Conditional violations [3]	Prohibition of slavery / forced labour	Right to liberty and security	Right to a fair trial [2]	Length of proceedings	Non-enforcement	No punishment without law	Respect for private and family life [2]	Freedom of thought, conscience, religion	Freedom of expression	Freedom of assembly and association	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried / punished twice	Other Articles of the Convention
							Art. 2	Art. 2	Art. 3	Art. 3	Art. 3	Art. 2/3	Art. 4	Art. 5	Art. 6	Art. 6	Art. 6	Art. 7	Art. 8	Art. 9	Art. 10	Art. 11	Art. 12	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4	
Albania	80	66	5	2	7		1	1	3	3			3	35	7	24	1	2					31		31				2
Andorra	8	4	2	1	1									2			1						1	1					
Armenia	123	112	6		5	4	4	1	11	6			37	42	2	6		4	5	1	11		8	1	31		1		9
Austria	397	279	77	24	17			1	4		1		13	95	115			20	1	35	1		18	27	4		1	4	
Azerbaijan	178	169	1	2	6	2	8	1	19	15			61	66	7	18		5	1	6	34		8		34		25		27
Belgium	260	181	45	18	16	3	1	1	24	3	3		51	63	59	1		12	1	4			15	9	1		1		2
Bosnia and Herzegovina	83	76	7					1	1				10	14	7	36	1	1	1				1	4	51				8
Bulgaria	701	628	47	5	21	15	29	4	80	39	4		270	101	180	14		79	9	18	15		190	8	118	1	5	1	22
Croatia	412	325	54	26	7	2	10		15	12		1	29	109	97	3	2	47		5	1	1	33	7	37			2	
Cyprus	82	68	7	3	4		2		9	4		1	16	11	35		1	7		1			12	3	4		1		1
Czech Republic	234	190	22	13	9	1	1		2	2			32	69	80			20		1	1		16	2	13				
Denmark	53	17	24	11	1						1		2	1	8			2		1	1		2	1	1				
Estonia	60	44	15	1					7	2			10	15	7		4	4		1			8		1				
Finland	190	141	36	9	4	1			2				2	37	62			24		20			10		2			6	
France	1,032	749	181	64	38	9	4	2	36	1	13	2	70	279	284	2	3	50	4	38	6		35	10	30			1	6
Georgia	104	83	17	1	3	4	6	1	24	14			23	27	5	1		7	3	1	1		4	7	7		2		6
Germany	348	195	125	13	15				4	1			32	26	102	1	10	23		9	2		24	13	4				1
Greece	1,022	917	39	20	46	4	7	1	119	11	1	4	85	138	542	13		13	13	15	7	1	270	15	79	2	3	2	1
Hungary	550	519	17	6	8	2	1		31	8			48	20	329		1	21		30	10		51	6	50		3		4
Iceland	31	23	5	3									1	8				1		7	2				1			3	
Ireland	38	24	9	1	4				1				2	5	13			5		2			9	1					
Italy	2,410	1,843	70	355	142	3	6	9	33	14			43	286	1,197	18	5	170		9	3		96	7	372	1	17	1	30
Latvia	144	115	24	3	2	1	2		19	13			59	21	19		1	29	3	4	1		5	2	2		3		9
Liechtenstein	9	8	1										1	3	4					1			2						

	Total of judgments	At least one violation	Friendly settlements / striking-out	Other judgments [1]	No violation	Right to life	Lack of effective investigation	Prohibition of torture [2]	Inhuman / degrading treatment	Lack of effective investigation	Conditional violations [3]	Prohibition of slavery / forced labour	Right to liberty and security	Right to a fair trial [2]	Length of proceedings	Non-enforcement	No punishment without law	Respect for private and family life [2]	Freedom of thought, conscience, religion	Freedom of expression	Freedom of assembly and association	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried / punished twice	Other Articles of the Convention
							Art. 2	Art. 2	Art. 3	Art. 3	Art. 3	Art. 2/3	Art. 4	Art. 5	Art. 6	Art. 6	Art. 6	Art. 7	Art. 8	Art. 9	Art. 10	Art. 11	Art. 12	Art. 13	Art. 14	P. 1-1	P. 1-2	P. 1-3	P. 7-4	
Lithuania	213	150	46	12	5	3	6		27	9				25	30	27	2	1	22	1	2	1		6	5	31		1	1	
Luxembourg	46	34	9	3			1							1	14	17			4		3	1		3	1	1				
Malta	101	74	16		11	1			3					26	12	9	1	2	4		5			7	4	30				1
Republic of Moldova	441	385	29	3	24	2	9	9	96	48				103	152	11	28	1	31	4	19	16		58	4	128		2		10
Monaco	3	3												1	3														
Montenegro	53	48	3		2		1		4	2				5	8	20	6		3		2			5	1	6				
Netherlands	165	93	44	16	12		4	1	10					30	30	8			17		7			2	3	1				
North Macedonia	165	145	12	3	5	2	2	3	5	11				17	47	65	5		7		2	5		10		12				1
Norway	53	34	19											1	12	2			12		6					1	1			
Poland	1,178	989	130	42	17	7	7	2	56	13				305	116	441	4		116	1	33	1	2	27	4	55				7
Portugal	354	270	19	56	9	2	4		1					7	38	144	6		15		27			43	2	47				
Romania	1,496	1,329	62	36	69	11	46	2	293	91				122	451	148	52	3	96	2	29	6		25	38	482	1	6	2	16
Russian Federation	2,699	2,551	104	14	30	310	346	63	875	221	40	1		1,121	881	205	151	2	220	10	72	45		633	19	655	3	6	4	144
San Marino	19	11	5	2	1									1	8	2			1	1						1				
Serbia	216	195	14		7		3		6	8				9	33	52	71		14		7			18	2	77		1	1	
Slovak Republic	374	334	11	22	7	2	2	1	4	3				55	42	208	2		22		10			38	3	20				1
Slovenia	368	338	23	4	3		3		21	6				6	23	263	3	1	12		2			266	3	7				
Spain	171	115	49	3	4				1	12				5	52	16	1	4	17		8			2	4	2				3
Sweden	153	61	59	28	5	1		1	4		5			2	28	12	1		9		2	1		3	1	6			1	
Switzerland	195	115	72	5	3		1		2	1	5			20	36	7			25	1	18	1	1	2	5					
Turkey	3,645	3,224	87	218	116	141	221	31	339	219				771	932	607	66	5	123	12	356	97		281	19	674	7	11		35
Ukraine	1,413	1,383	19	4	7	12	58	19	224	101				379	572	429	37	1	87	5	14	8	1	322	7	358		2	1	63
United Kingdom	552	320	141	68	23	2	20	2	17		1	1		70	93	30		1	72	1	12	4	4	34	45	3	2	8		2
Sub-total		18,977	1,809	1,120	716	547	816	157	2,432	893	74	10		3,982	5,086	5,884	573	51	1,475	79	845	282	10	2,634	294	3,470	18	99	30	411
Total [4]		**22,535**																												

VIOLATIONS BY ARTICLE AND BY STATE (2019)

This table has been generated automatically, using the conclusions recorded in the metadata for each judgment contained in HUDOC, the Court's case-law database.

1. Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.
2. Figures in this column may include conditional violations.
3. Cases in which the Court held there would be a violation of Article 2 and/or 3 if the applicant was removed to a State where he/she was at risk.
4. 19 judgments are against more than one State: Republic of Moldova and Russian Federation (16 judgments); Russian Federation and Ukraine (1 judgment); Cyprus and Turkey (1 judgment); and Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia (1 judgment).

VIOLATIONS BY ARTICLE AND BY STATE (1959-2019)

1. Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.
2. Figures in this column may include conditional violations.
3. Cases in which the Court held there would be a violation of Article 2 and/or 3 if the applicant was removed to a State where he/she was at risk. Figures in this column are available only from 2013 onwards.
4. Including 74 judgments which concern two or more respondent States.

Chapter 8

The year in pictures

23.01 | FINLAND AND THE ECHR EXHIBITION

On 23 January 2019 President Guido Raimondi and Sauli Niinistö, President of the Republic of Finland, inaugurated an exhibition in the Human Rights Building entitled "Finland presents 60 years of the European Court of Human Rights". Organised in connection with the Finnish Chairmanship of the Committee of Ministers, it consisted of a series of panels showing the key events in the Court's history, together with documents and information more specifically about Finland's connection with the Court.

25.01 | OPENING OF THE ECHR'S JUDICIAL YEAR

The official opening of the ECHR's judicial year took place on 25 January 2019. The event included a seminar on the topic "Strengthening Confidence in the Judiciary", attended by 260 eminent figures from the European judicial scene. This was followed by the official opening ceremony, attended by 330 representatives of the judicial world and of local and national authorities.
The guest of honour at this year's opening ceremony was Laurent Fabius, President of the French Constitutional Council.

07.02 | PRESIDENT OF THE GOVERNMENT OF SPAIN

Pedro Sánchez, President of the Government of Spain, visited the Court and was received by Guido Raimondi.

18.03 | HRH CROWN PRINCE HAAKON OF NORWAY

His Royal Highness the Crown Prince of Norway paid an official visit to the European Court of Human Rights.

05.04 | RENÉ CASSIN COMPETITION

Students from the University of Paris 2 were declared the winners of the 2019 René Cassin competition for law students. The final took place on 5 April 2019 and the jury was made up of prominent figures, including judges of the Court, lawyers, academics and representatives of the partner institutions of the competition. It was chaired by Mr Louis Schweitzer, former CEO of Renault and former President of the HALDE (the French anti-discrimination authority). This was the 34th edition of the René Cassin competition, consisting of mock legal proceedings in French and based on the European Convention on Human Rights. Thirty-two university teams from nine countries (Belarus, Belgium, France, Germany, Italy, the Netherlands, Romania, Russia and Switzerland), selected following the written stage of the competition, competed in a case concerning multinational companies and human rights.

05.05 | OPEN DAY

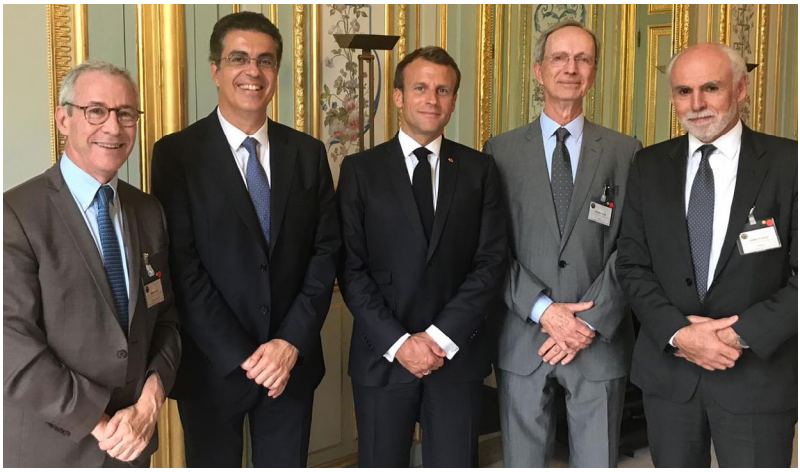
The Court held a very well-attended open day to mark its 60th anniversary. This was the first time in ten years that this iconic building was opened up to the public.

14.06 | "FRANCE & THE ECHR" EXHIBITION

President Linos-Alexandre Sicilianos and Ms Amélie de Montchalin, Secretary of State to the Minister for Europe and Foreign Affairs, responsible for European Affairs, inaugurated the "France & the ECHR" exhibition at the Court. This exhibition was part of the Court's 60th anniversary celebrations in conjunction with the French Chairmanship of the Committee of Ministers. It detailed the history of the relations between the Court and France, in particular the major role played by a number of prominent French figures in the drafting of the Convention, and presented the key judgments against France and their impact at national level.

26.06 | PRESIDENT OF THE REPUBLIC OF PORTUGAL

Marcelo Rebelo de Sousa, President of the Republic of Portugal, visited the Court and was received by President Linos-Alexandre Sicilianos.



12.09 | PRESIDENT OF THE FRENCH REPUBLIC

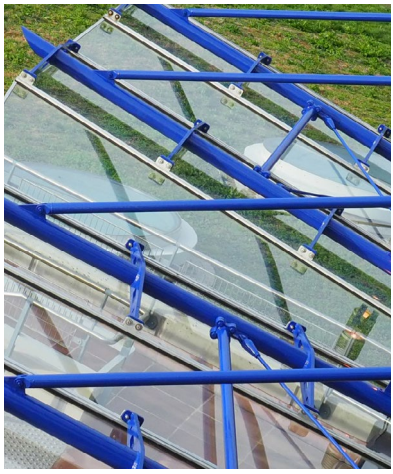
On 12 September 2019 the President of the Court was received by Emmanuel Macron, President of the French Republic, at the Elysée Palace. André Potocki, judge elected in respect of France, Roderick Liddell, Registrar, and Patrick Titiun, Head of the Office of the President, also attended the meeting.

12-13.09 | CONFERENCE OF THE CHIEF JUSTICES OF THE SUPREME COURTS

On 12 and 13 September 2019 President Linos-Alexandre Sicilianos attended the Conference of the Chief Justices of the Supreme Courts of the Council of Europe member States, held in Paris.

16.12 | PRIME MINISTER OF THE REPUBLIC OF MOLDOVA

Ion Chichu, Prime Minister of the Republic of Moldova, and Fadei Nagacevschi, Minister of Justice, were received by President Linos-Alexandre Sicilianos. Valeriu Grițco, judge elected in respect of the Republic of Moldova, and Roderick Liddell, Registrar, also attended the meeting.



THE COURT GETS A FACELIFT

Renovation of the paintwork of the exterior of the Human Rights Building, carried out from October to November, is finished. The building has got its original colours back: the red of its metal structure and the blue of the struts over the main entrance. The work will preserve the structure of the building, which was designed by Richard Rogers, the famous British architect, and inaugurated in 1995. The building, which on its 20th anniversary was given the "Outstanding contemporary architecture" award by the French Ministry of Culture, will celebrate its 25th anniversary in 2020.

The Annual Report of the European Court of Human Rights provides information on the organisation, activities and case-law of the Court.

In 2019 the Court celebrated its 60th anniversary. This Report contains a foreword by the President, an outline of the events that marked the year, the speeches delivered at the opening of the judicial year and the Jurisconsult's overview of the main developments in the case-law. The Report summarises the Court's recent procedural innovations and provides an update on its expanding knowledge-sharing and outreach programmes, notably the Superior Courts Network. Statistical data on the Court's workload and output are also included.

The Court's Annual Reports and other materials about the work of the Court and its case-law are available to download from the Court's website (www.echr.coe.int).

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www.echr.coe.int

The European Court of Human Rights is an international court set up in 1959 by the member States of the Council of Europe. It rules on individual or State applications alleging violations of the rights set out in the European Convention on Human Rights of 1950.

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EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE